

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**





# **TRANSCRIPT OF RECORD**

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**Court of Appeals of the District of Columbia**

**JANUARY TERM, 1924.**

**No. 4110.**

**82**

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**STEVE SUPER AND BENJAMIN H. WILDER, APPELLANTS,**

*vs.*

**HUBERT WORK, SECRETARY OF THE INTERIOR, AS A  
MEMBER OF THE FEDERAL POWER COMMISSION, AND  
HENRY C. WALLACE, SECRETARY OF AGRICULTURE, AS  
A MEMBER OF THE FEDERAL POWER COMMISSION.**

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**APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF  
COLUMBIA.**

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**FILED JANUARY 29, 1924.**

**PRINTED FEBRUARY 7, 1924.**





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JANUARY TERM, 1924.

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*vs.*

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MEMBER OF THE FEDERAL POWER COMMISSION, AND  
HENRY C. WALLACE, SECRETARY OF AGRICULTURE, AS  
A MEMBER OF THE FEDERAL POWER COMMISSION, AP-  
PELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF  
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# Court of Appeals of the District of Columbia.

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No. 4110.

STEVE SUPER et al., Appellants,

vs.

HUBERT WORK, Secy., &c.

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a Supreme Court of the District of Columbia.

In Equity.

No. 41330.

STEVE SUPER and BENJAMIN H. WILDER, Plaintiffs,

vs.

THE HONORABLE JOHN W. WEEKS, THE HONORABLE HENRY C. Wallace, and the Honorable Hubert Work, Members of the Federal Power Commission, and the Honorable Henry C. Wallace, Secretary of Agriculture of the United States, Defendants.

UNITED STATES OF AMERICA,  
*District of Columbia, ss:*

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above entitled cause, to wit:

1 *Amended Bill.*

Filed July 31, 1923.

In the Supreme Court of the District of Columbia.

In Equity.

No. 41330.

STEVE SUPER and BENJAMIN H. WILDER, Plaintiffs,

vs.

THE HONORABLE JOHN W. WEEKS, THE HONORABLE HENRY C. Wallace, and the Honorable Hubert Work, Members of the Federal Power Commission, and the Honorable Henry C. Wallace, Secretary of Agriculture of the United States, Defendants.

To the Honorable Walter I. McCoy, Chief Justice:

1. The plaintiffs Steve Super and Benjamin H. Wilder, are citizens of the United States and residents of the State of California, and bring this suit in their own right as commoners, or members of the Karok or Pehtsick tribe of Indians.

2. The defendants, the Honorable John W. Weeks, the Honorable Henry C. Wallace, and the Honorable Hubert Work, are citizens of the United States, and together constitute the Federal Power Commission, and are sued as members of the Federal Power Commission, and the Honorable Henry C. Wallace is Secretary of Agriculture of the United States, and is sued as the officer of the United States charged with and responsible for the administration and conduct of the Department of Agriculture.

3. Plaintiffs further show that by a treaty between the United States of America and the Republic of Mexico, signed at  
2 Guadalupe Hidalgo, February 2, 1848, a copy of which is hereto attached and marked Exhibit "A," there was ceded to the United States of America by the Republic of Mexico, the territory now constituting the State of California, including all that certain tract of land now comprising the Klamath National Forest Reserve.

4. That at the time the said territory was ceded to the United States of America the Karok or Peh-tsick tribe of Indians was in possession and occupation of the said land now constituting the said Klamath National Reserve as shown by the 18th Report (1897) of the Ethnology Bureau, Part 2, and by the report of the Hearings before a Subcommittee of the Committee on Indian Affairs, House of Representatives, Sixty-sixth Congress, Second Session, March 23, 1920, a copy of which is hereto attached and marked "Exhibit B."

5. That according to the documentary evidence contained in the 18th Report (1897) of the Ethnology Bureau (House Documents, Vol. 118, 56th Congress, 1st Session, 1899-1900) the said Karok or



Peh-tsick tribe of Indians, and its members, were entitled under the laws of Spain and the Republic of Mexico to the undisturbed possession and occupancy of the land upon which they were seated.

6. That the members of the said Karok or Peh-tsick tribe of Indians were recognized as citizens of the Republic of Mexico.

7. That Article VIII of the Treaty of Guadalupe Hidalgo, as originally signed on February 2, 1848, was as follows:

"Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the

United States, shall be free to continue where they now reside,  
3 or to remove at any time to the Mexican Republic, retaining the property which they possess in the said territories, or disposing thereof and removing the proceeds wherever they please without their being subjected on this account, to any contribution, tax, or charge whatever.

"Those who shall prefer to remain in the said territories, may either retain the title and rights of Mexican citizens or acquire those of citizens of the United States. But, they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories, after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.

"In the said territories, property of *every* kind, now belonging to Mexicans not established there, shall be *inviolably respected*. The *present owners, the heirs* of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it, guarantees equally ample as if the same belonged to citizens of the United States."

8. That Article IX of the Treaty of Guadalupe Hidalgo was as follows:

"The Mexicans who, in the territories aforesaid, who shall not preserve the character of citizens of the Mexican Republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States and be admitted, at the proper time (to be judged of by the Congress of the United States to the enjoyment of all the rights of citizens of the United States *according to the principles of the Constitution*; and in the meantime shall be maintained and protected in the free enjoyment of their liberty and *property* and secured in the free exercise of their religion without restriction."

9. That on May 26, 1848, the duly accredited commissioners of the United States of America and the Republic of Mexico, executed a so-called protocol, interpretative of the Treaty of Guadalupe  
4 Hidalgo, which as part of the said treaty was proclaimed on July 4, 1848, the first and second paragraphs of the said protocol being as follows:



"The American Government by suppressing the IXth Article of the treaty of Guadalupe Hidalgo and substituting the IIIrd Article of the Treaty of Louisiana, did not intend to diminish in any way what was agreed upon by the aforesaid Article IXth in favor of the inhabitants of the territories ceded by Mexico. Its understanding is that all of that agreement is contained in the IIIrd Article of the treaty of Louisiana. In consequence all the privileges and guarantees, civil, political, and religious, which would have been possessed by the inhabitants of the ceded territories, if the IXth Article of the treaty had been retained, will be enjoyed by them, without any difference, under the article which has been substituted.

"2nd. The American Government by suppressing the Xth Article of the treaty of Guadalupe Hidalgo did not in any way intend to annul the *grants of lands* made by Mexico in the ceded territories. *These grants*, notwithstanding the suppression of the article of the treaty, preserve the *legal value* which they may possess, and the grantees may cause their legitimate (titles) to be acknowledged before the American tribunals.

"Comformably to the law of the United States, *legitimate titles to every description of property, personal and real*, existing in the ceded territories are those which were legitimate titles under the Mexican law in California and New Mexico up to the 13th of May, 1846, and in Texas up to the 2nd of March, 1836."

10. That upon the cession by the Republic of Mexico under the said Treaty of Guadalupe Hidalgo of the territory now constituting the State of California the said Karok or Peh-tsick tribe of Indians and its members became subject to the law of the United States.

11. That the said Karok or Peh-tsick tribe of Indians continued to occupy the land which had constituted its tribal domain when the said tribe was subject to the law of Spain and later to the law  
5 of the Republic of Mexico.

12. That by a long line of decisions of the Supreme Court of the United States there was confirmed in the Indians of the United States, including the said Karok or Peh-tsick tribe of Indians and its members, their ancient right of perpetual possession and occupation of the lands upon which they were seated, it having been held repeatedly that the said lands were charged with the Indian right of exclusive possession so long as the Indians occupy the same.

13. That without regard to the rights confirmed in them by the said Treaty of Guadalupe Hidalgo, the said Karok or Peh-tsick tribe of Indians and its members acquired under the law of the United States of America the right of perpetual and exclusive possession and occupancy of their tribal domain, which right can be extinguished only by their voluntary consent, or by the exercise by the United States of the right of eminent domain.

14. That on March 3, 1851 an Act of Congress entitled "An Act to Ascertain and Settle the Private Land Claims in the State of California," was enacted, the said Act (9 Stat. L. U. S. 631—Ch. 41) providing as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that for the purpose of ascertaining and settling *private* land claims in the State of California, a commission shall be, and is hereby, constituted which shall consist of three commissioners to be appointed by the President of the United States, by and with the advice and consent of the Senate, which commission shall continue for three years from the date of this act, unless sooner discontinued by the President of the United States.

\* \* \* \* \*

6 "Sec. 8. Be it further enacted, that each and every person claiming lands in California by virtue of any right or title *derived* from the *Spanish* or *Mexican* government, shall present the same to the said Commissioners, when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims."

\* \* \* \* \*

15. That in 1851 it was the established policy of the United States of America to treat with Indian tribes as nations, and not with the members of Indian tribes individually, and to embody all agreements with Indian tribes respecting their tribal property, as distinguished from the individual property of Indians, in formal treaties, the Act of February 27, 1851 (9 Stat. 574, 586) providing that thereafter all Indian treaties should be negotiated by officers and agents of the Indian Department.

16. That upon the ascertainment by the Commission appointed under the said Act of March 3, 1851, of the claim of the said Karok or Peh-tsick tribe of Indians to the right under the Treaty of Guadalupe Hidalgo and under the laws of the United States, of occupation of their said tribal domain, one Redick McKee, a duly authorized agent of the Indian Department, pursuant to the said Act of February 27, 1851, acting on behalf of the United States of America, entered into a treaty with the duly authorized chiefs, captains and head men of the said Karok or Peh-tsick tribe of Indians, whereby the said tribe of Indians agreed to relinquish, cede, and forever quit-claim to the United States, all their right, title, claim or interest of any kind which they or any of them had in or to lands  
7 or soil in California, in consideration of which they were to receive a certain specified tract of land and other good and valuable consideration, the said treaty being set forth in full at pages 48-51 of Exhibit "B."

17. That the evidence presented Congress, and fully contained in Exhibit "B" and Exhibit "B-1," shows that the said treaty of October 6, 1851, for the reasons stated in the official correspondence, was not ratified by the Senate of the United States.

18. That inasmuch as the said treaty was not ratified by the Senate of the United States and, therefore, never became effective, the said Karok or Peh-tsick tribe of Indians and its members, continued to occupy their ancient tribal domain and to claim the rights therein

which had been confirmed in them by the Supreme Court of the United States.

19. That at sometime subsequent to October 6, 1851, and at a time unknown to the plaintiffs, the United States created the Klamath National Forest Reserve out of a part of the tribal domain of the said Karok or Peh-tsick tribe of Indians, and on February 1, 1905, the Congress of the United States by an Act entitled "An Act Providing for the Transfer of Forest Reserves from the Department of the Interior to the Department of Agriculture," placed the said Klamath National Forest Reserve under the jurisdiction of the Department of Agriculture.

20. That acting under the authority and orders of the Secretary of Agriculture of the United States various agents and representatives of the Department of Agriculture are now occupying and claiming on behalf of the United States possession of the said Klamath National Forest Reserve, and asserting control over the lands comprising the same, and the soil, the forests and the waters thereof, to the exclusion of the plaintiff's perpetual and exclusive rights therein, and changing the character of the said lands, and denying to your petitioners the right to the exclusive use and occupancy thereof, to the irreparable injury of the plaintiffs, and other members of the Karok or Peh-tsick tribe of Indians.

21. That by the Act of June 10, 1920 (41 Stat. L. 1063, Chap. 285) there was created a Federal Power Commission composed of the Secretary of War, the Secretary of the Interior, and the Secretary of Agriculture, and empowered among other things to issue licenses for the purpose of constructing, operating and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works, necessary or convenient for the development or improvement of navigation, and for the development, transmission and utilization of power across, along, from or in any of the navigable waters of the United States, or upon any part of the lands and reservations of the United States, it being further provided in the said act that licenses shall be issued with respect to any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the Department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation.

22. That various applications have been filed by the Electro-Metals Company, of San Francisco, California, with the Division of Water Rights, Department of Public Works, State of California, as set out in the correspondence attached hereto and marked "Exhibit C," looking to the diversion and use by the said Electro-Metals Company of the waters of the Klamath River in Siskiyou and Humboldt Counties, California, and within the tribal domain of the said Karok or Peh-tsick tribe of Indians, and within the said Klamath National Forest Reserve which have been referred to the said Federal Power Commission and which are now pending before the said Commission.

23. That the granting of the said applications by the Federal Power Commission and the completion of the various projects of the said Electro-Metals Company would work the plaintiffs irreparable injury since the said projects are of such a nature that if permitted to be completed they would necessarily affect adversely the rights of the plaintiffs in the waters of their tribal domain, and deny to them their right to exclusive possession and occupancy of their tribal domain.

24. That the said Karok or Peh-tsick tribe of Indians have at all times held their tribal domain and enjoyed such rights as they possessed therein, in common, and that the individual interest, right, or title of the members of the said tribe is a communistic interest, right, or title, similar to that of the members of all other Indian tribes who possess, or have possessed a tribal right of occupancy of the tribal domain.

10      25. That the plaintiffs, Steve Super and Benjamin Wilder are members of the said Karok or Peh-tsick tribe of Indians; that they are direct descendants of members of that tribe who resided within the tribal domain of the Karok or Peh-tsick tribe of Indians prior to the creation of the Klamath National Forest Reserve; that they now reside in Siskiyou and Humboldt Counties, respectively, within their tribal domain, and within the Klamath National Forest Reserve; that they and their fathers before them have at all times been in actual possession of their tribal domain in common with other members of their tribe; that at all times they have claimed their right to reside upon their tribal domain and to enjoy in common with their fellow tribesmen the perpetual right of exclusive possession and occupancy thereof.

26. That the plaintiffs have no remedy at law.

Plaintiffs, therefore, pray writs of injunction may issue to the Honorable John W. Weeks, Henry C. Wallace, and Hubert Work, members of the Federal Power Commission, and the Honorable Henry C. Wallace, Secretary of Agriculture, of the United States, perpetually enjoining them from approving the said applications of the Electro-Metals Company, and of doing or performing any other act that will have the effect of depriving the plaintiffs and the Karok or Peh-tsick tribe of Indians, and its members, of the perpetual right of exclusive occupancy and possession of any part of their tribal domain, including the sending upon the said Klamath National Forest Reserve of their agents or representatives for purposes of residing thereon, or using in any way the soil, the forests, and the waters thereof, such as by the building of dams,  
11      reservoirs, the diversion of streams, the granting of water rights, the construction of houses, roads, bridges, fences, the planting and cutting of trees, the removal of timber, the planting and removal of crops, mining, the taking and removal of stone, earth or ores, and of changing in any way the character of the soil, the forests, and the waters thereof; and if it shall be found by this Honorable Court that the defendants are doing or performing acts which have the effect of depriving the plaintiffs and the Karok or Peh-tsick tribe of Indians of their right of exclusive occupancy and



possession of their tribal domain, that a temporary restraining order may issue enjoining them from such acts until the final hearing of this cause, and for other and further relief as may be proper in the premises.

JENNINGS C. WISE,  
*Attorney for the Plaintiffs.*

DISTRICT OF COLUMBIA, ss.:

Now comes Jennings C. Wise, Attorney for Steve Super and Benjamin H. Wilder, and says that he has read the foregoing bill of complaint, and believes the facts stated therein to be true.

JENNINGS C. WISE.

Subscribed and sworn to before me this 30<sup>th</sup> day of July, 1923.

[SEAL.]

JANET W. LAKE,  
*Notary Public.*

My commission expires May 26<sup>th</sup>, 1926.

12

EXHIBIT "C."

Filed May 23, 1923.

Copy.

Federal Power Commission,

Washington.

April 2, 1923.

Projects, Calif. (#74), Electro Metals Co.

Mr. F. G. Collett, Executive Representative,  
Indian Board of Cooperation,  
3 City Hall Avenue,  
San Francisco, Calif.

DEAR SIR:

In reference to your letter of March 26, I have to inform you that the Commission received on October 23, 1920, an application from the Electro Metals Company for a proposed power project on Klamath River. Hearings on this application were held by the District Engineer of the Forest Service at Yreka and Requa. The Commission has held in abeyance action on the application, however, pending the action of the Division of Water Rights, Department of Public Works of California, on the Company's application for a permit to appropriate waters of the Klamath for power purposes. This latter body has withheld action pending the outcome of an investigation by the State of California and the U. S. Reclamation Service on the proposed Klamath-Shasta irrigation project.

It is not known when the Division of Water Rights will be ready to act on the case, but you can no doubt ascertain the status of the application by applying direct to it.

Very truly yours,

O. C. MERRILL,  
*Executive Secretary.*

13

Copy.

State of California,  
Department of Public Works,  
Sacramento.

April 5, 1923.

Applications Nos. 2187-12-3140.

Mr. F. G. Collett,  
Executive Representative, Indian Board of Co-op.,  
3 City Hall Avenue,  
San Francisco, Calif.

DEAR SIR:

In reply to your letter under date of March 26th, last requesting information pertaining to the applications of the Electro Metals Company, in Siskiyou County, California, please be advised as follows:

Application 2187.

This application was filed February 1, 1921, having its source on the Klamath River in Humboldt County, being within the Northeast quarter (N. E.  $\frac{1}{4}$ ) of the Northeast Quarter (N. E.  $\frac{1}{4}$ ) and Southeast Quarter (S. E.  $\frac{1}{4}$ ) of the Southeast Quarter (S. E.  $\frac{1}{4}$ ) of Section Four (4) Township Eleven (11) North, Range Six (6) East, Humboldt Meridian. The amount sought to be appropriated is three thousand (3,000) cubic feet per second and eighty-nine thousand six hundred fifty-five (89,655) acre feet per annum, both diversions from January 1st to December 31st, of each year.

The place of use is given as within the Southwest Quarter (S. W.  $\frac{1}{4}$ ) of the Northeast Quarter (N. E.  $\frac{1}{4}$ ) of Section Nine (9), Township Eleven (11) North, Range Six (6) East, Humboldt Meridian. It is planned to utilize three hundred feet fall and the maximum amount of water to be passed through the penstock is given as three thousand (3,000) cubic feet per second, giving a theoretical horsepower to be developed of 102,270. The power is to be used in the treatment of metals and any excess is to be sold to public utilities companies. The estimated cost of this project is given as \$8,000,000.00.

The reservoir is to embrace parts of Section Four (4), Township eleven (11) North, Range Six (6) East, Section Four (4), Nine (9) Ten (10), Sixteen (16), Twenty-one (21), Twenty-eight (28) and Thirty-three (33), Township Twelve (12) North, Range Six (6) East; Sections Five (5), Eight (8), Seventeen (17), Eighteen (18) Nineteen (19), Twenty (20) Twenty-nine (29) Thirty-two (32), Thirty-three (33), Township Thirteen North Range Six (6) East; Sections Twenty-nine (29), Thirty-two (32), Township Fourteen (14) North, Range Six (6) East, Humboldt Base and Meridian. The forebay capacity is given as eighty-nine thousand

14 six hundred fifty-five (89,655) acre feet. The reservoir capacity is given as one hundred fifty-seven thousand six hundred eighty (157,680) acre feet. The water is to be returned to the Klamath River within the Southwest Quarter (S. W.  $\frac{1}{4}$ ) of the Northeast quarter (N. E.  $\frac{1}{4}$ ) of Section Nine (9), Township Eleven (11) North, Range Six (6) East, Humboldt Base and Meridian.

This application is not sufficiently complete for advertising yet. A hearing has been set for April 10th next to consider various phases of the project brought forth by the various proceedings.

Application No. 12-340.

Under the above number application, please see the advertising notice enclosed herewith.

This notice gives a complete description of the project as outlined before this office at the present time. The following additional matter may also be of interest to you:

Prior to July 21, 1920, the applicant states that not less than \$127,000.00 were expended on this project and that they have since that date spent \$64,397.00. The applicant asks ten years' time within which to complete the project. The proposed reservoir under this application is the same as described under application 2187.

It is trusted that this information will answer the inquiries contained in your letter above mentioned.

Very truly yours,

H. A. KLU EGEL,

*Chief of Division.*

By E. HYATT, JR.,

*Deputy Chief of Division.*

15

Copy.

Department of Public Works,

Sacramento.

Form 8a.

Division of Water Rights.

*Notice of Application to Appropriate Water.*

Application No. 12-3140.

Notice is hereby given, That Electro-Metals Compan- (A Trust) of 729 Call Building, San Francisco, California, has applied to the Division of Water Rights, Department of Public Works, State of California to have time prescribed within which it must apply to beneficial use the waters of Klamath River in Humboldt and Siskiyou Counties, claimed under a notice of appropriation by Carl and Frank Langford, recorded September 18th, 1908, in Liber 6 of Water

Rights, at Page 340, Records of Siskiyou County, which calls for the diversion of five hundred thousand (500,000) inches of water flowing in the Klamath River for irrigation, mining, power, domestic and other useful purposes.

This application under Section 12 of the Water Commission Act, Statutes of 1913, Chapter 586, calls for the diversion of three thousand (3000) cubic feet per second by means of ninety thousand (90,000) acre feet of storage per annum of the waters of Klamath River in Siskiyou and Humboldt Counties to be diverted at a point within the S. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  Sec. 33 T. 12 N. R. 6 E. H. M., water to supply Power House No. 1. The point of diversion to storage is to be within the S. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  Sec. 4 T. 11 N. R. 6 E. H. M., and the point of diversion to supply Power House No. 2 is to be within the N. E.  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$  of Sec. 20 T. 11 N. R. 6 E. H. M.

The water taken at the first point of diversion to be carried through a tunnel 1750 feet long and to be used at Power House No. 1 in the S. E.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  Sec. 4 T. 11 N. R. 6 E. H. M., and returned to the stream within the same S. E.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  Sec. 4. The water taken at the second point of diversion to be used at Power House No. 2 located right at the dam within the N. E.  $\frac{1}{4}$  of S. E. P. Sec. 20 T. 11 N. R. 6 E., and returned to the stream within the same N. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  Sec. 20. The power generated is to be used for Electro Metallurgy, Electro Chemistry, and such commercial use as may arise.

16      *Motion of Hubert Work, Secretary of the Interior, to Dismiss Amended Bill.*

Filed August 1, 1923.

\*                      \*                      \*                      \*                      \*                      \*

Comes now Hubert Work, Secretary of the Interior, as a member of the Federal Power Commission, defendant in the above entitled suit, and moves to dismiss the amended bill of complaint herein filed; and for cause shows:

1. That the bill fails to disclose facts showing any title or right in the plaintiffs which entitle them or either of them to institute or maintain this suit.

2. That the plaintiffs have not in or by their bill set forth facts sufficient to entitle them to the relief prayed or to any relief in equity.

3. That the suit is in substance against the United States which has not been made a party hereto and has not consented to be sued in respect to the matter set forth in the bill.

Wherefore he moves that the bill of complaint be dismissed with his reasonable costs and that he may be permitted to depart hence without day.

HUBERT WORK,  
*Secretary of the Interior,*  
 By His Attorney, C. EDW. WRIGHT,  
*Attorney.*



17 *Motion of Henry C. Wallace, Secretary of Agriculture, to  
Dismiss Amended Bill.*

Filed August 14, 1923.

\* \* \* \* \*

Comes now Henry C. Wallace, who, as a member of the Federal Power Commission and as Secretary of Agriculture, is made a defendant in the above entitled cause, and moves the court to dismiss the amended bill of complaint herein, on the following grounds:

I. This suit is, in substance, one against the United States, which has not been made a party thereto or given its consent to be sued.

II. The plaintiffs have not by their bill set forth facts sufficient to entitle them to the relief prayed for or to any relief in equity.

III. To grant the relief prayed for would constitute an unwarranted interference by the court with the duties and the powers conferred by Congress upon the Federal Power Commission and upon the Secretary of Agriculture.

IV. The court is without jurisdiction of the subject matter of this suit in so far as it relates to this defendant as Secretary of Agriculture in the administration of the Klamath National Forest, since the suit to that extent is local in character.

V. The plaintiffs have been guilty of such laches as ought in equity to bar them from the relief prayed for against this  
18 defendant as Secretary of Agriculture.

W. D. RITER,  
Assistant Attorney General.  
H. L. UNDERWOOD,  
Attorneys for Henry C. Wallace.

*Decree Dismissing Amended Bill.*

Filed October 26, 1923.

\* \* \* \* \*

This cause came on to be heard on the motions of the defendants to dismiss the amended bill of complaint herein filed, and was argued by counsel; whereupon, the court being fully advised in the premises, it is, this 26th day of October, 1923,

Ordered, adjudged and decreed that the motions to dismiss be, and the same hereby are sustained and granted and that the bill of complaint as amended, be, and the same hereby is dismissed, with costs to the defendants to be taxed by the clerk.

By the Court:

WALTER I. McCOY,  
Chief Justice.

And from the foregoing decree the plaintiffs in open court by their counsel, on the day last above written, note an appeal to the Court of Appeals of the District of Columbia, and the same is hereby

allowed: the bond for costs on appeal to be in the penal sum of One Hundred Dollars, with leave to plaintiffs to deposit the sum of Fifty Dollars in lieu thereof with the clerk of the court.

By the Court:

WALTER I. McCOY,  
*Chief Justice.*

19      No objection as to form.  
JENNINGS C. WISE,  
          *Counsel for Plaintiffs.*

*Memorandum.*

October 26, 1923.—\$50.00 deposited in lieu of Appeal Bond.

*Assignments of Error.*

Filed October 26, 1923.

\*            \*            \*            \*            \*            \*

The Court erred:

1. In not holding that the bill disclosed facts showing a title or right in the plaintiffs which entitles them to maintain this suit.
2. In not holding that the bill sets forth sufficient facts to entitle them to the relief prayed or to any relief.
3. In ruling in substance that this suit is against the United States.
4. In sustaining the motion to dismiss and in dismissing the bill.
5. In failing to grant the relief sought.

JENNINGS C. WISE,  
*Attorney for Plaintiffs.*

20                      *Designation of Record.*

Filed October 26, 1923.

\*            \*            \*            \*            \*            \*

The Clerk in making up the record will include the following:

1. The Amended Bill of Complaint, and Exhibit "C."
2. The motions to dismiss.
3. The Decree dismissing the Bill, notation and allowance of appeal.
4. The assignment of errors.
5. This designation.

JENNINGS C. WISE,  
*Counsel for Plaintiffs.*

Service acknowledged Oct. 26/23.

C. EDW. WRIGHT,  
*Atty. for Deft. Work.*

14            STEVE SUPER ET AL. VS. HUBERT WORK, SEC'Y, ETC.

21            Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,  
    *District of Columbia, ss:*

I, Morgan H. Beach, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 20, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed copy of which is made part of this transcript, in cause No. 41330 in Equity, wherein Steve Super et al. are Plaintiffs and The Honorable John W. Weeks, et al. are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 26th day of January, 1924.

[Seal of the Supreme Court of the District of Columbia.]

MORGAN H. BEACH.

*Clerk.*

EW.

Endorsed on cover: District of Columbia, Supreme Court. No. 4110. Steve Super et al., appellants, vs. Hubert Work, Secy., &c. Court of Appeals, District of Columbia. Filed Jan. 29, 1924. Henry W. Hodges, clerk.





COURT OF APPEALS  
DISTRICT OF COLUMBIA  
FILED

FEB 6 - 1924

*Henry M. Hodges*

IN THE

**Court of Appeals, District of Columbia**

STEVE SUPER and BENJAMIN H.  
WILDER, *Appellants,*

*vs.*

The HONORABLE JOHN W.  
WEEKS, the HONORABLE  
HENRY C. WALLACE, and the  
HONORABLE HUBERT WORK,  
Members of the Federal Power  
Commission, and the HONOR-  
ABLE HENRY C. WALLACE,  
Secretary of Agriculture of the  
United States, *Defendants.*

*No. 4110*

In Equity No. 41330.

**BRIEF FOR THE APPELLANTS**

MUNN, ANDERSON & MUNN,  
JENNINGS C. WISE,  
736 Transportation Building,  
Washington, D. C.  
*Of Counsel.*

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United States, *Defendants.*

In Equity No. 41330.

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**STATEMENT**

This appeal is from a final decree of the Supreme Court of the District of Columbia entered October 26, 1923.

**THE FACTS**

By a treaty between the United States of America and the Republic of Mexico, signed at Guadalupe Hidalgo, February 2, 1848, there was ceded to the United States of America by the Republic of Mexico the territory now constituting the State of California. (See copy of treaty filed with the bill herein as Exhibit "A".)

Within the ceded territory at the time of cession it is authoritatively estimated that there were resident approximately 201,000 Indians. (See Annual Report of the Department of the Interior for 1901, p. 346.)

These Indians at the time of the cession were citizens of the Republic of Mexico.

(See treaty of Cordova, 1821, and the Acts of the Congress of the Republic of Mexico, 1822, 1823, quoted in Hoyt vs. U. S., 38 Ct. Cl. 455.)

Among them was the Karok or Peh-tsick tribe of Indians which from time immemorial had occupied and laid claim to a certain tract of land in northern California as their tribal domain, which tract embraced the present counties of Siskiyou and Humboldt in the State of California, through which tract and counties flow the Klamath River and its tributary streams, the tribal domain of the Karoks being definitely and officially defined in the 18th Report (1897) of the Ethnology Bureau, Part 2, filed with the bill herein and marked Exhibit "B". (Also see Hearings before a Subcommittee of the Committee on Indian Affairs, House of Representatives, Sixty-Sixth Congress, Second Session, March 23, 1920, filed as part of Exhibit "B".)

Upon the acquisition by the United States in 1848 of the California territory, the Karoks or Peh-tsick tribe of Indians continued to occupy their tribal domain.

By the Act of June 30, 1834 (R. S. 2118, C. 161, Sec. 11, 4 Stat. 730) it was provided that

"No purchase, grant, lease or other conveyance of lands, or any title or claim thereto, from any Indian Nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty

or convention entered into pursuant to the Constitution \* \* \*."

The Act of February 27, 1851 (9 Stat. 574), required that thereafter all Indian treaties should be negotiated by officers and agents of the Indian Department. Accordingly, on October 6, 1851, one Redick McKee, a duly authorized agent of the United States acting in his capacity as a Commissioner or Indian Agent of the Indian Office of the Department of the Interior, tentatively negotiated a treaty on behalf of the United States with the Karok or Peh-tsick tribe of Indians.

In the said treaty of October 6, 1851, the Karok tribe by its duly appointed chiefs, captains and head men, agreed to relinquish, cede, and forever quit claim to the United States, all their right, title, claim or interest of any kind which they or any of them had to lands or soil in California, in consideration of the setting apart to their use by the United States of a definite tract of land. By the terms of the treaty the tribe was to remove to this tract within three years, or sooner if required by the United States, and the use and possession thereof by them and their successors forever was guaranteed by the United States.

(See Exhibits "B" and "B-1.")

The proposed treaty of October 6, 1851, was transmitted to the President by the Secretary of the Interior with an endorsement approving the same, and by the President transmitted to the Senate, which, for reasons fully appearing of record in the Hearings before a Subcommittee of the Committee on Indian Affairs, House of Representatives, Sixty-Sixth Congress, Second Session (See Exhibit "B"), failed to ratify the same. Briefly stated, these



reasons were that white settlers in ever-increasing numbers in search of gold were occupying California, so that for political reasons the Senate was unwilling to grant any of the newly acquired territory to Indians over the objections of the white settlers.

The Senate failing to ratify the said treaty, the Karok tribe continued to occupy their original domain, and openly and notoriously to claim the right of exclusive possession thereof, and have continued to do so to the present time.

By an Act approved March 3, 1891, Congress empowered the President "to set apart and reserve, in any State or Territory having *public land* bearing forests, *in any part of the public lands* wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations," and provided that the President should establish such reservations as he might set apart and define the limits thereof by public proclamation. (Italics added.)

Subsequent to this Act by Proclamation dated May 6, 1905, the President established and set apart the reservation presently known as the Klamath National Forest, the said reservation being created out of the original tribal domain of the Karok tribe.

By an Act approved February 1, 1905, the forest reserves had been transferred from the jurisdiction of the Department of the Interior to that of the Department of Agriculture, so that the Klamath National Forest when created came under the immediate executive control of the Secretary of Agriculture, under whose jurisdiction it now is.

By the Act of June 10, 1920 (41 Stat. L., 1063, Chap. 285), there was created the Federal Power Commission composed of the Secretary of War, the Secretary of the

Interior, and the Secretary of Agriculture, and the said Commission was empowered among other things to issue licenses for the purpose of constructing, operating and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works, necessary or convenient for the development or improvement of navigation, and for the development, transmission and utilization of power across, along, from or in any of the navigable waters of the United States, or upon any part of the public lands and reservations of the United States, it being further provided in the said Act that a license might be issued with respect to any reservation only after a finding by the Commission that it would not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and that licenses should be subject to and contain such conditions as the Secretary of the Department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation.

Subsequent to the passage of the Act referred to, the Electro-Metals Company, of San Francisco, California, filed various applications with the Division of Water Rights, Department of Public Works, State of California, for licenses to divert and use the waters of the Klamath River in Siskiyou and Humboldt Counties, California, within the Klamath National Forest and within the tribal domain of the Karok tribe, which applications were duly referred to and are now pending before the Federal Power Commission, and which applications under the Act of June 10, 1920, require the approval of the Appellee, the Honorable Henry C. Wallace, as Secretary of Agriculture.

The Karok or Peh-tsick tribe of Indians is still in existence, and occupies the territory which constituted its origi-

nal tribal domain, including the Klamath National Forest, holding its property in common in accordance with the tribal laws.

The appellants are members of the Karok or Peh-tsick tribe and are direct descendants of Indians who were members of that tribe at the time the territory of California was ceded to the United States, and who were occupying at that time the tribal domain.

### **THIS ACTION**

July 31, 1923, the appellants herein (plaintiffs below) filed their amended bill in which the facts recited hereinbefore in substance appear.

The relief asked was that the defendants (appellees herein), the Honorable John W. Weeks, the Honorable Henry C. Wallace, and the Honorable Hubert Work, Members of the Federal Power Commission, as such, and the Honorable Henry C. Wallace, Secretary of Agriculture of the United States, as such, be perpetually enjoined from granting the licenses applied for by the said Electro-Metals Company, and from "doing or performing any other act that will have the effect of depriving the plaintiffs and the Karok or Peh-tsick tribe of Indians, and its members, of the perpetual right of exclusive occupancy and possession of any part of their tribal domain, including the sending upon the said Klamath National Forest of their agents or representatives for purposes of residing thereon, or using in any way the soil, the forests, and the waters thereof, such as the building of dams, reservoirs, the diversion of streams, the granting of water rights, the construction of houses, roads, bridges, fences, the planting and cutting of trees, the removal of timber, the planting and removal of crops, mining, the taking and removal of stone, earth or ores, and of

changing in any way the character of the soil, the forests, and the waters thereof," and that in the event it should be found that the appellees herein were doing or performing acts which have the effect of depriving the appellants herein and the Karok or Peh-tsick tribe of Indians of their right of exclusive occupancy and possession of their tribal domain, a temporary restraining order issue enjoining them from such acts until the final hearing of this cause, and for such other and further relief as might be proper in the premises.

August 1 and 14, 1923, respectively, the defendants below, the Honorable Hubert W. Work and the Honorable Henry C. Wallace, filed motions to dismiss the amended bill, the following several grounds being assigned in the two motions:

1. That the bill fails to disclose facts showing any title or right in the plaintiffs which entitles them or either of them to institute or maintain this suit.

2. That the plaintiffs have not in or by their bill set forth facts sufficient to entitle them to the relief prayed or to any relief in equity.

3. That the suit is in substance against the United States which has not been made a party hereto and has not consented to be sued in respect to the matter set forth in the bill.

4. To grant the relief prayed for would constitute an unwarranted interference by the court with the duties imposed and the powers conferred by Congress upon the Federal Power Commission and upon the Secretary of Agriculture.

5. The court is without jurisdiction of the subject matter of this suit in so far as it relates to the defendant, the Secretary of Agriculture, in the administration of the Kla-

math National Forest, since the suit is to that extent local in character.

6. The plaintiffs have been guilty of such laches as ought in equity to bar them from the relief prayed for against the Secretary of Agriculture.

The decree from which this appeal is taken is as follows:

“Ordered, adjudged and decreed that the motions to dismiss be, and the same hereby are sustained and granted and that the bill of complaint as amended, be, and the same hereby is, dismissed, with costs to the defendants to be taxed by the clerk.”

### **THE ASSIGNMENT OF ERRORS**

The assignments of error (Rec., p. 19) embrace the contentions that the court erred in not holding that the bill disclosed facts showing a title or right in the plaintiffs which entitles them to maintain this suit, in not holding that the bill sets forth sufficient facts to entitle them to the relief prayed or to any relief, in ruling in substance that this suit is against the United States, in sustaining the motion to dismiss and in dismissing the bill, and in failing to grant the relief sought.

#### **I**

### **THE RIGHT OF EXCLUSIVE OCCUPANCY AND POSSESSION EXISTED IN THE KAROK TRIBE UNDER THE LAW OF SPAIN AND MEXICO.**

A study of the policy of Spain with respect to the Indians of California shows that while the nomadic Indians were not regarded as the owners of the fee, either individually or collectively as tribes, in the domains claimed and occupied by the several tribes inhabiting that territory, yet the



right on the part of the tribes to the undisturbed occupancy and possession of their respective tribal domains was recognized by the Government, and that the most jealous regard was had for their rights.

(18th Report (1897) of the Ethnology Bureau (House Documents, Vol. 118, 56th Congress, 1st Session, 1899-1900).)

It was the policy of Spain to prohibit the taking by individuals of lands occupied by the Indians without both the approval of the Government and adequate compensation, and where the lands actually used by the Indians were taken by the Government itself the occupants were compensated. Compensation by the Government usually took the form of the grant of other land.

*(Ibid.)*

The view of the Supreme Court of the United States with respect to the right of occupancy possessed by the Indians of Mexico under the law of Spain appears in the body of the decision in *Mitchell et al. vs. The United States*, 9 Peters 710, in which the Court in very positive terms recognized that right as existing in the Seminole Indians. Said Mr. Justice Baldwin:

“As Florida was for twenty years under the dominion of Great Britain, the laws of that country were in force as the rule by which lands were held and sold; it will be necessary to examine what they were as applicable to the British provinces before the acquisition of the Floridas by the Treaty of Peace in 1763. One uniform rule seems to have prevailed from their first settlement, as appears by their laws; that friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in

the tribe or nation inhabiting them as their common property from generation to generation not as the right of the individuals located on particular spots.

"Subject to this right of possession the ultimate fee was in the crown and its grantees, which could be granted by the crown or colonial legislatures while the lands remained in the possession of the Indians, though possession could not be taken without their consent.

"Individuals could not purchase Indian lands without permission or license from the crown \* \* \*; but such purchases were valid with such license or in conformity with the local laws; and by this union of the perpetual right of occupancy with the ultimate fee, which passed from the crown by the license, the title of the purchaser became complete.

"Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds *were as much in their actual possession as the cleared fields of the whites*; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected until they abandoned them, made a cession to the Government, or an authorized sale to individuals \* \* \*.

"The merits of this case do not make it necessary to inquire whether the Indians within the United States had any other rights of soil or jurisdiction; it is enough to consider it as a settled principle that their right of occupancy is considered as sacred as the fee simple of the whites. (5 Peters 48.)

\* \* \*

"But Spain did not consider the Indian right to be that of mere occupancy and perpetual possession, but a right of property in the lands they held under the guaranty of treaties, which were so highly respected, that in the establishment of a military post by a royal order, the site thereof was either purchased from the

Indians or occupied with their permission, as that of St. Mark's. \* \* \*

"On these considerations, we are clearly of the opinion that the Indians who claimed the lands in question had, under the government of Great Britain and Spain, a right of property in them which could not be impaired without a violation of the laws of both, and the sanctity of repeated treaties; that these rights continued till the time of the cession, are guaranteed by the treaty and acts of Congress in relation to the Floridas, in perfect conformity with its stipulations and faith unless the Indians had previously made a binding transfer to the parties under whom the petitioner claims them."

The United States Court of Claims in the case of Hoyt vs. United States (38 Ct. Cl. 455), while finding that under Spanish law and custom the Indian right of occupancy was respected in case of lands acquired by Spain from old Mexico, does not find explicitly that Mexico had any established policy of recognizing the right of occupancy of savage Indians. In discussing the point the court says:

"It is said for defendants that Spain never recognized Indian titles except those of the Cherokee, Seminole, and others in Florida and in southern possessions of the Kingdom in this country, and that as to this country the grant from the Indians was always the grant of the fee; that the King of Spain made no concessions respecting Indian titles in Mexico, but claimed the whole country for his own; that this claim by virtue of conquest was maintained until Mexico acquired its independence and that Government in turn never acknowledged the existence of aboriginal title. The significance of the proposition is that if the Indian title to occupancy was never recognized by Spain and Mexico the title acquired

by the United States was obtained free from incumbrance by virtue of previous Indian occupancy. In other words, the contention is that there was no Indian title to extinguish when the former sovereign lost control."

"There are authorities which hold that the Spanish law did not recognize any kind of title to the soil growing out of occupation in wild or wandering tribes (*Byrne vs. Olas*, 74 Cal., 628) and that the uncivilized Indians were as free from being considered in the laws of Spain and Mexico as the wild beasts of the forest (*United States vs. Lucero*, 1 New Mexico, 422)."

"The rule was stated very early that Indians were deemed to be the rightful occupants of the soil with a legal as well as just claim to retain possession and use it at discretion. The nations asserted ultimate dominion with power to convey a title to the grantees, but every grant was subject to the Indian right of occupancy. Spain did not rest her title solely on the grant of the Pope, but based her claim upon the right of discovery. (*Johnson vs. McIntosh*, 8 Wheat., 575.) This qualified claim of title by virtue of discovery seems to have included the acquisitions of Spain from Old Mexico because the original right of occupation was respected by the laws of Spain, but the occupants could not part with this right except in the mode pointed out by Spain. (*Chouteau vs. Moloney*, 16 How. 201, *Mitchell vs. United States*, 9 Pet. 724.) So much for Spain."

"But as for Mexico, neither the researches of counsel nor the investigations of the court disclose recognition of aboriginal title by that Government. When the independence of Mexico was established in 1821 the revolutionary government adopted a decree known as the 'Plan of Iguala.' This plan was reaffirmed by the treaty of Cordova and its principles were adopted by the Mexican Congress under enactments in 1822 and 1823. By this plan it was declared

that 'All the inhabitants of New Spain, without distinction, whether Europeans, Africans, or Indians, are citizens of this Monarchy, with a right to be employed in any post, according to their merit and virtues.' Under these declarations the civilized Indians of Mexico have enjoyed political rights. And it is interesting to note in this connection that Juarez, who came to the presidency of the Mexican Republic, was a full-blooded Indian. So far as the wild tribes are concerned they do not seem to have had reservations set apart to them, *but they remained in Mexico without molestation* because no doubt they were too numerous to be expelled and yet too uncivilized to be incorporated in the body politic."

"No account seems to have been taken of them in the settlement scheme of Mexico. By the first colonization law there it was provided 'that the lands of the Government which are not the property of any individual, corporation, or town, are the subject of the law and may be colonized.' " (Sec. 27. Law of 1824, Rockwell's Span. and Mex. Law, 451; United States vs. Vallejo, 1 Black, 541.)

"In Chihuahua, where the Apaches, Ute, and Navajo Indians resided, colonization was provided for a large portion, if not all, of what now comprises New Mexico and Colorado. This was in 1825 and no reference was then made to Indian titles. (Reynolds's Span. and Mex. Laws, 132.) So, in the colonization scheme provided by Sonora, it appears that 'there are colonizable in the State all the desert and vacant lands on its frontiers which belong to it and are not the property of an individual, corporation, or town.' " (Ibid. 296.)

"The Supreme Court of the United States has taken judicial notice of the status of the civilized Indians in New Mexico. (United States vs. Ritchie, 17 How. 156; United States vs. Joseph.) But the status of the uncivilized tribes was not considered in those cases."



"The right to remove Indians from any portion of the ceded territory was recognized by the 11th Article of the Treaty of Guadalupe Hidalgo. (9 Stat. L. 930.) By a treaty made between the United States and the Navajos those Indians came under the exclusive jurisdiction and protection of the United States, and the laws regulating trade and intercourse with the United States were extended over the Navajo Country."

It will be observed from the above that although Mexico had no announced or declared policy of recognition of the Indian right of occupancy, Mexico nevertheless *practiced* such policy, for, as stated by the court, the Mexican Indians, numerous as they were, "*remained in Mexico without molestation.*"

In the case of *Barker vs. Harvey* 181 U. S. 480, the Supreme Court of the United States found itself considering Mexican grants (made prior to the Treaty of Guadalupe Hidalgo) which expressly comprehended and protected the existing Indian right of occupancy. It appears from this case that the Mexican Government in 1840 granted to one Jose Antonio Pico the place known as "Agua Caliente" belonging to the Mission of San Luis Rey. Indians were living on this property. The Justice of the Peace who reported on the application for the grant decided that the land could be awarded to Pico, "but without prejudice to the Indians who from it derive their support." In the grant of these lands to Jose Antonio Pico by Juan B. Alvarado, Constitutional Governor of the Department of both Californias, the following among other things was stated:

"\* \* \* I have resolved to grant him the said place, subjecting himself to pay for the place of worship, and other improvements that be there belong-

ing to the San Luis Rey Mission, and not molest (prejudicar) the Indians that thereon may be established. \* \* \*

The Pico grant was not approved by the Departmental Assembly and it appears that the land was later granted by Mexico to one Warner. No reference to Indians was contained in the Warner grant, for the magistrate who investigated the application reported that the Indians had abandoned the land. Yet, the foregoing shows conclusively that the law of Mexico, like that of Spain, had a sacred regard for the right of occupancy of the Indians.

## II

### **THE RIGHT OF OCCUPANCY WHICH THE KAROK TRIBE POSSESSED UNDER THE LAW OF SPAIN AND MEXICO WAS A PROPERTY RIGHT.**

It is true that the Indians were never deemed by Spain or Mexico to possess that which under the law of the United States amounts to a complete title, or one characterized by the three stages or degrees of possession—naked possession, right of possession, and right of property.

But the right of occupancy is none the less a property right.

See *Hamilton v. Rathbone*, 175 U. S. 421; *Jones v. Van Zandt*, 4 McKean (U. S.) 603.

As applied to real property the term property includes every species of title, inchoate or complete.

*Soulard v. U. S.*, 4 Pet. (U. S.) 511; *Delassus v. U. S.*, 9 Pet. (U. S.) 133.

It includes equitable as well as legal titles to land, incorporeal hereditaments, and easements.

*Teschmacher v. Thompson*, 18 Cal. 24; *Thompson v. Doakum*, 68 Cal. 597.

An owner of real estate is not necessarily one owning the fee simple.

See *Couvis v. Citizens Mut. F. Ins. Co.*, 127 Mich. 616; *Baltimore, etc., R. Co. v. Walker*, 45 Ohio St. 58.

One having a lesser estate may be the owner.

*Santa Cruz Rock Pavement Co. v. Lyons* (Cal. 1896) 43 Pac. Rep. 599.

In fact, the term owner has been applied to anyone having a defined interest in land.

See *Gitchell v. Kriedler*, 84 Mo. 476.

The right of possession or occupancy, is the right to possession which may reside in one man, while another has the actual possession, being the right to enter and turn out such actual occupant.

See 2 Black. Comm. 196.

Title, as applied to real estate, is generally defined to be merely the means whereby the owner of lands has the just possession of his property.

See Co. Litt. 345; 2 Bl. Comm. 195.

Title in its ordinary acceptation is not understood to mean a perfect title.

See *Irving v. Brownell*, 11 Ill. 403.

A party may have title to property although he is not the absolute owner.

See *Roberts v. Wentworth*, 5 Cash. (Mass.) 192.

And one who has the right of possession of a thing is said to have the title to it.

*Rodgers v. Palmer*, 33 Conn. 155.

*Roberts v. Wentworth*, 5 Cash. (Mass.) 192.

*Chapman v. Dougherty*, 87 Mo. 617, 56 Am. Rep. 469.

*Camfield v. Johnson*, 21 N. J. L. 83.

*Dunster v. Kelly*, 110 N. Y. 558.

*Carroll v. Rigney*, 15 R. I. 81.

The word *property* as used in a treaty and applied to land, comprehends all vested rights, titles, whether legal or equitable, inceptive, inchoate, or perfect. It embraces rights which lie in contract, as well those which are executory as those which are executed.

*Soulard v. U. S.*, 4 Pet. (U. S.) 511.

*Smith v. U. S.*, 10 Pet. (U. S.) 327.

*Strother v. Lucas*, 12 Pet. (U. S.) 410.

*Ward v. Mulford*, 32 Cal. 365.

*Thompson v. Doakum*, 68 Cal. 593.

And in *Mitchell et al. vs. The United States*, *supra*, the Supreme Court of the United States expressly declared the right of occupancy possessed by Indian tribes occupying Spanish territory to have been "a right of property."

In view of the foregoing authorities it will hardly be contended that the right of occupancy which the Indian tribes possessed in their tribal domains under the law of Mexico was not a property right, title to which they possessed.

## III

**THE PRE-EXISTING RIGHT OF THE KAROK  
TRIBE WAS CONFIRMED BY THE TREATY  
OF GUADALUPE HIDALGO.**

When James K. Polk became President of the United States on March 5, 1845, diplomatic relations between the United States and Mexico had been suspended. The Mexican Minister had demanded his passports a few days before from the Secretary of State of the previous administration, and with this demand had sent a leave-taking note in which he angrily charged that the United States had assumed a hostile attitude toward his country in the annexation of Texas, referring to the Joint Resolutions of Congress providing for such annexation, approved March 1, 1845 (5 Stat. 797).

In this situation of affairs, President Polk formed a definite and decided policy with respect to his dealings with Mexico. He proposed, among other things, to acquire New Mexico and Upper California by purchase. In an entry in the President's diary under the date of September 17, 1845, he states that on that day he had announced clearly to his cabinet that he would try to adjust through the Texas question a permanent boundary between Mexico and the United States, so as to comprehend Upper California and New Mexico and to give the United States a line from the mouth of the Rio Grande to latitude 32 degrees north, and thence west to the Pacific. For such a boundary he was willing to pay, he said, \$40,000,000, but he could probably get it for \$15,000,000 or \$20,000,000. In these views the cabinet unanimously concurred. (American Diplomacy Under Tyler and Polk, by Reeves, p. 272.)

Negotiations pursuant to this purpose were attempted, but failed to accomplish any immediate substantial result. A



controversy was then in progress concerning the boundary between the two countries, brought about by the annexation of Texas. The United States claimed to the Rio Grande, while Mexico claimed that the boundary between that country and Texas had been the Nueces River.

President Polk, in support of the claim of the United States, ordered General Taylor to cross the Nueces and occupy its western bank with a force of United States troops, and later the President ordered General Taylor to advance to the Rio Grande to a point opposite the Mexican town of Matamoras, which he did. The general in command of the Mexican forces at that point demanded that General Taylor withdraw to the Nueces River. This General Taylor refused to do, and thereupon a Mexican force under the command of General Arista crossed the Rio Grande. A collision occurred between the two forces, resulting in the defeat of the Mexicans at Palo Alto on May 8th, and at Resaca de la Palma on May 9th. On May 13, 1846, Congress passed the act declaring war with Mexico, and on the same day the President issued a proclamation to that effect. The forces of the United States proceeded to occupy the territory of New Mexico and to prosecute the war upon Mexican soil.

On July 7, 1846, Commodore Sloat, in command of the Pacific Squadron, pursuant to instructions from the Navy Department, landed at Monterey, hoisted the American flag at that place, and gave notice that he would carry it through California.

In Commodore Sloat's proclamation to the people of California he declared that the territory would be a portion of the United States, and its peaceable inhabitants would enjoy the same rights and privileges as the citizens of any other part of the nation then enjoyed. He also announced that "All persons holding titles of real estate, or in quiet

possession of lands under a color of right, should have their titles and their rights guaranteed to them." This proclamation was in accordance with the principles of modern international law, but the reaffirmance of protection of private rights naturally had a very quieting effect upon the inhabitants of this part of the territory, and it was not long before all opposition to the occupation of California by the forces of the United States ceased.

The conquest of New Mexico was accomplished with equal promptness and even less opposition. On June 26, 1846, General Stephen W. Kearny set out from Fort Leavenworth, Kansas, under the direction of the War Department, with a force of 1,657 men, for Santa Fe, the capital of New Mexico. He arrived at that point and entered the city on August 18, 1846, without firing a gun or spilling a drop of blood; he took possession of the capital of the territory, hoisted the Stars and Stripes on the flagstaff over the Governor's palace, and on August 22, 1846, issued a proclamation claiming the whole department with its original boundaries as a part of the territory of the United States.

In September, with a small part of his command, General Kearny took up his march for California, where he arrived in December, and became the first military Governor of the Territory, having been preceded by Commodores Sloat and Stockton as naval commanders.

Thus, it is seen that California and New Mexico were acquired by practically a peaceful conquest, welcomed by the inhabitants. This conquest was, however, subject to the policy, judicially and politically declared, that a war will not be prosecuted by the United States for the acquisition of territory. (*Fleming v. Page*, 9 How. 614; *De Lima v. Bidwell*, 182 U. S. 1; *Dooley v. United States*,

182 U. S. 222; *Downes v. Bidwell*, 182 U. S. 244; *Hawaii v. Mankichi*, 190 U. S. 197.) The most that can be said is that military occupation of foreign territory may be made with the expectation and purpose that it shall be retained and its cession demanded and secured by treaty as an indemnity for injuries and expenses. (*Palmer v. United States*, 1 Hoff. 249, 254.) This was the policy pursued by the Government of the United States in dealing with Mexico in the war of 1846-48.

The war was ended by the treaty of Guadalupe Hidalgo, signed on February 2, 1848 (9 U. S. Stat. 922). In this treaty it was provided that the United States should pay Mexico \$15,000,000. The United States also assumed the payment of certain claims which had long been due citizens of the United States by Mexico, amounting to \$3,250,000. Mexico waived all claim to Texas, and the Rio Grande was established as the southwestern boundary of the United States. This boundary admitted that the provinces of New Mexico and California had become a part of the territory of the United States. The treaty provided, in articles VIII and IX, full and complete protection for all property rights of Mexicans, whether residing in the ceded territories or elsewhere.

Article VIII, in part, reads:

“Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican Republic, retaining their property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, and without their being subjected, on this account, to any contribution, tax or charge whatever.”

In his dissenting opinion in the case of Scott vs. Sandford, 19 Howard, 533, Mr. Justice McLean said:

"On the question of citizenship it must be admitted that we have not been very fastidious. Under the late treaty with Mexico, we have made citizens of all grades, combinations and colors. The same was done in the admission of Louisiana and Florida. No one ever doubted, and no court ever held that the people of these territories did not become citizens under the treaty. They have exercised all the rights of citizens without being naturalized under the acts of Congress." (Cited in the Rodriguez case, 81 Fed. 351.)

But if any doubt should remain as to whether the right of occupancy of the tribal Indian was to be re-affirmed and acknowledged by the Treaty of Guadalupe Hidalgo, convincing reference need only be made to the concluding paragraph of Article XI of that treaty. The first part of Article XI dealt with an obligation the United States assumed with respect to preventing Indian raids into Mexico and the return of captives taken by the Indians. A similar engagement on the part of the United States had been made by Article XXXIII of the Treaty of April 5, 1831, between the United States and Mexico. Under Articles II and III of the treaty of December 30, 1853, between the United States and Mexico, the United States was released from "*liability*" to Mexico for the obligations which had been assumed with respect to Indian incursions into Mexico, the consideration for such release being \$10,000,000. The United States had manifestly found already that Indian raids and incursions into Mexico created international situations and pecuniary liabilities.

But, although the United States obtained release from Mexico for all liability resulting from Indian incursions

into Mexico, the United States did not thereby disavow its historic and traditional policy of respecting the Indian right of occupancy, for the concluding sentence of Article XI was merely a re-affirmation of American Indian policy enunciated both before and after the date of the treaty of 1848. That sentence read as follows:

“And, finally, the sacredness of this obligation shall never be lost sight of by the said Government, when providing for the removal of the Indians from any portion of the said territories, or for its being settled by citizens of the United States; but, on the contrary, special care shall then be taken not to place its Indian occupants under the necessity of seeking new homes, by committing those invasions which the United States have solemnly obliged themselves to restrain.”

Nothing could be more clear from the foregoing language than that both the United States and Mexico, the high contracting parties in the Treaty of Guadalupe Hidalgo, deemed the tribal Indians to possess an inviolable right of occupancy in their tribal domains, and that the United States assumed a solemn obligation to protect them in that right.

In Article VI of the Constitution of the United States, the Constitution and the laws of the United States made pursuant thereto, and all treaties made, or which shall be made, under the authority of the United States, are declared to be the supreme law of the land.

See *Foster v. Neilson*, 2 Pet. (U. S.) 253.  
*Strother v. Lucas*, 12 Pet. (U. S.) 410.  
 R. S. Sec. 709, J. C. Sec. 237.

With regard to the effect of the guarantees which were contained in the Treaty of Guadalupe Hidalgo it may be said that since the validity of that treaty has never been questioned, in the absence of a subsequent law abrogating



the treaty or amending the same, the guarantees contained therein must, under Article VI of the Constitution, be taken as the law of the United States. No other treaty or legislative enactment abridging or abrogating those guarantees has been pleaded in this suit. Upon what principle of law, then, can the contention be based that the Karok tribe does not now possess that right which under the law of Mexico it possessed, and which was confirmed in the tribe by the express guarantees of the Treaty of Guadalupe Hidalgo?

#### IV

### **THE RIGHT OF OCCUPANCY WHICH THE KAROK TRIBE POSSESSED UNDER THE LAW OF SPAIN AND MEXICO WOULD UNDER INTERNATIONAL LAW SURVIVE IN THE ABSENCE OF THE TREATY OF GUADALUPE HIDALGO.**

If it be conceded that the Indian right of occupancy under the Mexican law was a property right, it is contended that that right not only remained in the Karok tribe after the cession of 1848 by virtue of the treaty of Guadalupe Hidalgo, but that it would have remained in the tribe even in the absence of the stipulations contained in the treaty by virtue of International Law.

“A cession of territory is never understood to be a cession of the property belonging to its inhabitants.”

Treaties, Their Making and Enforcement, Crandall, 2nd Ed., p. 569.

“There can be no question that United States courts will not allow a mere cession of territory to the United States to injure or abrogate vested rights of land ownership, legal or equitable, held by individuals at the time of cession.”

See *Change of Sovereignty and Private Ownership of Land*, Sayre, Am. J., XII, 475, 495.

"It must be clear that the construction placed upon the statutory law of the former sovereign by its tribunals prior to a change of sovereignty should be respected by those of its successor after the change. In this connection see *Kealoha v. Castle*, 210 U. S. 149."

Int. Law, Charles Cheney Hyde, Vol. 1, p. 202.

"The Government of the United States therefore holds that titles derived from a duly constituted prior foreign Government to which it has succeeded are consecrated by the law of nations even as against titles claimed under its own subsequent laws."

Mr. Bayard, Secretary of State, to Mr. Roberts, March 20, 1886, More. Dig. 1, 421, 422.

"A right of any validity before cession of territory is equally valid afterwards."

U. S. v. Moreno, 1 Wall. (U. S.) 400.

As said by Chief Justice Marshall in *United States v. Perchman*, 7 Peters 50, 86:

"It may not be unworthy of remark, that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations which has become law would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged if private property should be generally confiscated and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other and their rights of property remain undisturbed."

As again said by the Supreme Court in *United States v. Moreno* (1 Wall. 400, 404), such rights "were consecrated by the laws of nations. The treaty stipulation was but a

formal recognition of the pre-existing sanction in the law of nations.”

In his treatise on the Conflict of Laws, Cambridge, 1916, Sec. 131, J. H. Beale says:

“There can be no break or interregnum in law. From the time law comes into existence with the first-felt corporateness of a primitive people it must last until the final disappearance of human society. Once created, it persists until a change takes place, and when changed it continues in such changed condition until the next change, and so on forever. Conquest or colonization is impotent to bring law to an end; in spite of change of constitution, the law continues unchanged until the new sovereign by a legislative act creates a change.”

The principle announced by Beale has been recognized repeatedly by the Supreme Court of the United States.

See Marshall, C. J., in *Am. Ins. Co. v. Canter*, 1 Pet. 511, 542;

*Strother v. Lucas*, 12 Pet. 410, 438;

*U. S. v. Power's Heirs*, 11 How. 570;

*Chicago & Pac. Ry. Co. v. McClinn*, 114 U. S. 452;

*Vilas v. Manila*, 220 U. S. 345.

In the case of *Delassus vs. The United States*, 9 Peters 117, involving the Treaty of 1803 with France ceding Louisiana to the United States, Chief Justice Marshall said:

“The right of property, then, is protected and secured by the treaty; and no principle is better settled in this country, *than that an inchoate title to lands is property.*

“Independent of treaty stipulations, this right would be held sacred. The sovereign who acquires an inhabited territory acquires full dominion over it; but this dominion is never supposed to divest the vested rights

of individuals to property. The language of the treaty ceding Louisiana excludes every idea of interfering with private property; of transferring lands which had been severed from the royal domain. The people change their sovereign. Their right of property remains unaffected by this change."

In the case of the United States vs. Sibbold, 10 Peters 313, the Supreme Court of the United States upheld the title to lands in Florida obtained under Spanish grant.

As said before, in the case of Mitchell *et al.* vs. The United States, 9 Peters 710, the Supreme Court of the United States in very positive terms recognized the property rights of Seminole Indians which had been confirmed by treaty with Spain, and held in unequivocal language that property rights existing under Spanish regime would be recognized by the United States under international law and duly respected. On this point Mr. Justice Baldwin said in deciding the case:

"\* \* \* it will suffice to state some general results of former adjudications which are applicable to this case, are definitively settled, so far as the power of this court can do it and must be taken to be the rules of its judgment. They are these:

"That by the law of nations, the inhabitants, citizens, or subjects of a conquered or ceded country, territory or province, retain all the rights of property which have not been taken from them by the orders of the conqueror, or the laws of the sovereign who acquires it by cession and remain under their former laws until they shall be changed.

"That a treaty of cession was a deed or grant by one sovereign to another which transferred nothing to which he had no right of property and only such right as he owned and could convey to the grantee. That by the treaty with Spain the United States acquired no lands in Florida to which any person had lawfully ob-

tained such a right by a perfect inchoate title. \* \* \*

“In taking possession of Florida pursuant to the treaty, and in establishing a Government in and over it, Congress acted on the same principles as those which were adopted by the court in the former cases. In the Act of 1821 for carrying the treaty into execution, Congress authorizes the vesting of the whole power of Government in such person as the President may direct for the maintaining of the inhabitants in the full enjoyment of their property.” (Pamphlet Laws 47.)

In the case of *Townsend vs. Greeley*, 5 Wall. 326, 338, the United States Supreme Court said:

“The Treaty of Guadalupe Hidalgo does not purport to divest the Pueblo existing at the site of the city of San Francisco of any rights of property, or to alter the character of the interests it may have held in any lands under the former Government. It provides for the protection of the rights of the inhabitants of the ceded country to their property; and there is nothing in any of its clauses inducing the inference that any distinction was to be made with reference to the property claimed by towns under the Mexican Government. \* \* \*”

In the case of *Crystal Springs Land and Water Co. vs. City of Los Angeles*, reported at page 153, Vol. 76, Federal Reporter, the Court held that notwithstanding the fact that both parties to the suit claimed their rights under Mexican grants, confirmed and patented in the United States, the suit did not come within the scope of laws conferring jurisdiction upon Federal Courts. In support of this position the Court cited *Phillips vs. Association*, 124 U. S. 605-612, and *Powder Works vs. Davis*, 151 U. S. 389-391, quoting from the first cited case as follows:

“Article 8 of the treaty protected all existing



property rights within the limits of the ceded territory, but it neither created the rights nor defined them. Their existence was not made to depend on the Constitution, laws, or treaties of the United States. There was nothing done but to provide that if they did in fact exist under Mexican law, or by reason of the action of Mexican authorities, they should be protected. Neither was there any provision made as to the way of determining their existence. All that was left by implication to the ordinary judicial tribunals. Any court, whether state or national, having jurisdiction of the parties and of the subject-matter of the action, was free to act in the premises."

In this case District Judge Wellborn stated in substance that the ownership in property rights acquired through the Government of Mexico was amply established by international law and needed no confirmation by treaty. In discussing the Treaty of Guadalupe Hidalgo Judge Wellborn said:

"\* \* \* Suppose the eighth and ninth articles had been altogether omitted, and that the treaty was otherwise silent as to the rights of property in the ceded territory; would it not by the law of nations have been obligatory upon the United States to afford such rights protection as ample as that declared in said articles? See *Boteller vs. Dominguez*, 130 U. S. 238, 9 Sup. Ct. 235; *U. S. vs. Moreno*, 1 Wall. 400-305; *Mitchell vs. U. S.*, 9 Pet. 710. And, if this be so, does it not follow therefrom that a dispute or controversy about the construction of the treaty is irrelevant and therefore neither real nor substantial? \* \* \*

The Court held finally that no act of Congress or any authority exercised under the Constitution or laws of the United States had been called into question.

In view of the foregoing authorities it is clear that even if the right of occupancy possessed by the Karok tribe under the law of Spain was never affirmatively recognized by the Republic of Mexico in a statutory enactment, the right, since it was a property right, survived to the Karok tribe under the sovereignty of Mexico, and would in turn have survived under the sovereignty of the United States even in the absence of statutory or treaty recognition.

## V

### **THE TRADITIONAL POLICY OF THE GOVERNMENT OF THE UNITED STATES WITH RESPECT TO THE INDIAN RIGHT OF OCCUPANCY HAS BEEN UNIFORMLY APPLIED TO INDIANS FORMERLY OCCUPYING MEXICAN TERRITORY.**

From President Washington on down to this day the Government of the United States has recognized and pledged itself to protect the Indian right of occupancy. The position of the United States was very early developed in its dealings with the Six Nations in New York. In a speech by Cornplanter, Chief of the Senecas, to President Washington, the Indian Chief said:

“The land we live on, our fathers received from God, and they transmitted it to us, for our children, and we cannot part with it.” (Am. State Papers, Indian Affairs, Vol. 1, p. 140.)

In reply President Washington said:

“The General Government will never consent to your being defrauded, but will protect you in all your just rights.” (Am. State Papers, Vol. 1, p. 142.)

President Washington further said:

"The Agent who will be appointed by the United States will be your friend and protector. He will not be suffered to defraud you or to assist in defrauding you of your lands, or of any other thing, as all his proceedings must be reported in writing, so as to be submitted to the President of the United States." (Ibid. p. 144.)

The fact that the United States undertook and intended by the Treaty of Guadalupe Hidalgo to apply to the Indians of California and New Mexico (who formerly lived on Mexican territory) the traditional American policy of recognizing the Indian right of occupancy, is revealed in the subsequent attitude of the United States toward these Indians. The Ute Indians, for instance, lived on lands out of which the territories of New Mexico, Utah, and Colorado were subsequently created. In the celebrated case of the Ute Indians vs. the United States, reported in 45 Court of Claims, p. 440, involving an accounting due for Indian lands taken by the United States, it was held that although the territory ceded by Mexico to the United States by the Treaty of Guadalupe Hidalgo may not have been "Indian Country," it nevertheless was in the occupation of the Indians and the United States recognized a right in them sufficient to be the subject of treaty and cession. (9 Stat. L. 984; 13 Stat. L. 673; 15 ed. p. 619.)

It was held further in this case that where Indians had no title to lands which the Court could recognize as valid, yet if they honestly claimed title, the relinquishing of it to a party who wished to purchase would be a good consideration; and that in the case of lands derived from Mexico under the treaty of Guadalupe Hidalgo the cession by the Indians to the United States of their interest in such lands

was a sufficient consideration to sustain the agreement set forth in the Act of June 15, 1880 (21 Stat. L. p. 199). In deciding the case the court, among other things, said:

“While it may be true that the Indian title of the plaintiffs to any territory prior to the treaty of 1863 was not such a title as the defendants would recognize, yet the plaintiffs were located within this territory and had the usual claim of occupancy of other Indians. This claim was considered of such importance that the defendants during the year following the Guadalupe Hidalgo treaty entered into a treaty with them and secured from them a concession for the right of free passage through their territory. (9 Stats. 984.) By the treaty of 1863 (13 Stats. 673) the defendant considered these claims to territorial occupancy of sufficient importance to obtain from them a cession of all claim, title, etc., to lands within the territory of the United States, excepting certain lands which were set apart to them as their hunting grounds.” (P. 465.)

The Ute case is conclusive that the Government of the United States intended by the treaty of Guadalupe Hidalgo to recognize in the former Mexican Indians whatever property rights they had under Mexican law, and that even had such law given them no property rights, the United States nevertheless at all times intended and undertook that these Indians, like all other tribal Indians in the United States, should be respected in their *right of occupancy*.

The instructions of the Department of the Interior in 1850 to go among the Karok Indians of California and to make treaties with them if necessary (see Part VII of this brief) shows that the Federal Government recognized in the Karoks, as they did in the Utes, the Indian right of occupancy—of possession of lands.

In the Acts of March 3, 1851, and March 3, 1891, Con-

gress manifested in the clearest words its intent not to deprive the Indians inhabiting the territory acquired from Mexico by the Treaty of Guadalupe Hidalgo of the right of occupancy which they possessed under the law of Spain and Mexico.

In the first of these acts, or the Act of March 3, 1851, after providing for the settlement by a Commission of private land grants derived from the Spanish and Mexican governments, Congress expressly stipulated in Section 16 that the tenure by which the mission lands, those held by civilized Indians, and those which were occupied by other Indians, should be ascertained and reported to the Secretary of the Interior, the Commission being given no power to deal with lands held by Indians.

In the second of these acts, or the Act of March 3, 1891, it was expressly stipulated in Section 13 that no claim should be allowed by the Court of Private Land Grants which was created by the Act, that would interfere with or overthrow any just and unextinguished Indian title or right to any land or place.

Thus did Congress guard against the possibility that either the Commission created by the Act of March 3, 1851, or the Court of Private Land Grants created by the Act of March 3, 1891, should adjudicate Indian titles in such a way as in effect to set aside the existing rights of the Indians with respect to their lands as confirmed in the Treaty of Guadalupe Hidalgo.

As late as 1910 the Congress of the United States by statute expressly reaffirmed the traditional policy of the United States of respecting and protecting the Indian right of occupancy, for in the enabling act of June 20, 1910 (36 Stat. Part I, p. 557) by virtue of which New Mexico was admitted into the Union as a state, Congress stipulated that



the constitutional convention should, by irrevocable ordinance, provide:

*"That the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right of title to which shall have acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States."*

The enabling act of June 16, 1906, by virtue of which Oklahoma was admitted to statehood, contained a similar provision for the protection of Indian rights and property. (34 Stat. Vol. I, p. 267.)

## VI

### **THE RIGHT OF THE KAROK TRIBE EXISTS BY VIRTUE OF THE LAW OF THE UNITED STATES INDEPENDENTLY OF THE LAW OF MEXICO AND THE TREATY OF GUADALUPE HIDALGO.**

When the territory of California was ceded to the United States the Indian inhabitants who remained therein became wards of the United States and subject to the Constitution and laws of the United States. If they possessed property rights upon becoming wards of the United States they were undoubtedly entitled to as full protection in those rights under the Constitution and the laws of the United States as any other Indians of the United States.

The rights of Indians and Indian tribes in the lands occupied by them in the United States had been fixed by the Supreme Court of the United States long before the Indians of California became subject, in 1848, to those laws.

The judicial classic on the subject of the title of the Indians is the opinion of Chief Justice Marshall (1823) in *Johnson v. McIntosh*, 8 Wheat. (U. S.) 543. This celebrated opinion was last confirmed by the Supreme Court of the United States in 1895, when in *Spaulding v. Chandler*, 160 U. S. 403, Chief Justice White said:

“The Indian title against the United States was merely a title and right to the perpetual occupancy of the land with the privilege of using it in such mode as they saw fit until such right of occupation had been surrendered to the government.”

Here it is to be noted that the title consistently held by the Supreme Court of the United States to reside in the Indians in nowise differs from the title previously confirmed in them by the law of Spain, since the State under the law of both sovereignties was held to possess ultimate dominion over the land occupied by the Indians though the land remain charged with the Indian right of occupancy. Thus, it is seen that even in the absence of the specific stipulations of the Treaty of Guadalupe Hidalgo, International Law, and the law of the United States with respect to the persistence of former titles under a new sovereignty, the Indians of California upon becoming subject to the political dominion and the laws of the United States would have been endowed with a property right of which under the Vth Amendment to the Constitution of the United States they could not be divested by the Government without just compensation.

The innumerable decisions respecting the Indian right of

occupancy which have been rendered by the Supreme Court of the United States are entirely consistent with this view.

Where the land occupied by the Indians of the United States was not granted to them with the power on their part to alienate the same, but was merely secured to them charged with their right of exclusive possession so long as they actually occupy the same, it follows necessarily that the owners of the Indian title, collectively, or individually, can convey no valid title to the land.

See *Johnson v. McIntosh*, *supra*.

Nor can they transfer their right of occupancy without the consent of the United States since the right of possession confirmed in them by the United States is conditioned upon actual occupancy.

(*Ibid.*)

But it has ever been held that the right of the Indians to their occupancy is as sacred as that of the United States to the fee.

*U. S. v. Cook*, 19 Wall. (U. S.) 591.  
*Leavenworth, etc., R. Co. v. U. S.*, 92 U. S. 733.

And it has been the uniform policy of the Government to prohibit settlements on Indian lands and to make grants of such lands only subject to the Indian right of occupancy.

See R. S. 2118, 2257-2289.  
*Preston v. Browder*, 1 Wheat. (U. S.) 115.  
*Danforth v. Thomas*, 1 Wheat. (U. S.) 155.  
*Danforth v. Wear*, 9 Wheat. (U. S.) 673.  
*Gaines v. Nicholson*, 9 How. (U. S.) 356.  
*Hot Spring Cases*, 11 Ct. Cl. 238.  
*Langford's Case*, 12 Ct. Cl. 338.

In conformity with this policy R. S. 2126 provided that

in all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian makes out a presumption of title in himself from the fact of previous possession or ownership. (Act of June 30, 1834, c. 161; sec. 22, 4 Stat. 733.)

It is submitted, therefore, that in accordance with this principle the burden of proof in the instant case rests upon the appellees herein and not upon the appellants to show that the Karok tribe has been divested in accordance with law of the right of occupancy which it possessed under the law of Spain and which was guaranteed to it by the Treaty of Guadalupe Hidalgo.

So long as land held by Indians remain inalienable, or charged with the Indian right of occupation, no title thereto can be acquired by adverse possession.

See Johnson v. McIntosh, *supra*.  
U. S. v. Chappelle, 81 Fed. 152.  
U. S. v. Sandoval, 231 U. S. 45-48.

Nor does laches run against a tribal Indian either in favor of an individual or the United States.

Laughton v. Nadeau, 75 Fed. 789-94.  
The Sandoval Case, 231 U. S. 45, 48.

How then, in the face of these decisions, and without regard to the Treaty of Guadalupe Hidalgo, could the United States have acquired title to the domain of the Karok tribe free of the Karok right of occupancy except by the voluntary consent of the Karok tribe, or by the exercise of the right of eminent domain?

## VII

**THE LAW AND THE POLICY OF THE UNITED STATES WITH RESPECT TO THE SETTLEMENT OF THE CLAIMS OF INDIAN TRIBES.**

So chaotic were the conditions in respect to the land rights of the Indian tribes in California after the acquisition of that territory that it was necessary for the Government to ascertain and determine the rights of the California tribes. In fact it was more important to satisfy the Indian tribal claims than it was to quiet private titles since the tribes, harried by the invasions of a pressing white population, were naturally becoming restive to the point of resistance to the ever-increasing encroachments upon their rights. In the Treaty of Guadalupe Hidalgo the United States had solemnly pledged itself to protect the Indian tribes against just such invasions.

By the Act of June 30, 1834, the policy had been established by statute (R. S. 2116) of dealing with the Indian tribes as such as separate nations by treaty. When, therefore, the necessity of adjusting the tribal claims arose it was possible under the existing laws for the Government to settle those claims in but one way and that was by treaties with the tribes. This fact was fully recognized by Congress which on June 5, 1850, enacted a law authorizing the President to appoint one or more Commissioners to negotiate treaties with the several tribes in the territory of Oregon for the extinguishment of their claims to lands lying west of the Cascade Mountains; and if found expedient and practicable, for their removal east of the said mountains. The sum of \$25,000 was appropriated for this and other purposes. (9 Stat. 437.)



On September 28, 1850, Congress passed a law authorizing the appointment of not more than three agents for the Indian tribes within the State of California and it was provided that "such agents shall perform the duties now prescribed by law to Indian agents \* \* \*" (9 Stat. 519).

The Indian Appropriation Act of September 30, 1850, carried an item of \$30,000 with which to defray the "expenses of procuring information and collecting statistics necessary to the Indian Bureau and for making treaties with, and presents to, the various tribes of Indians residing within the limits of the United States upon the borders of Mexico, \* \* \*" (9 Stat. 556).

This act also carried a further appropriation of \$25,000 "to enable the President to hold treaties with the various Indian tribes in the State of California \* \* \*" (9 Stat. 558).

The following public documents, copies of which were furnished by the President of the United States to a Committee of Congress in 1923, as shown by the letters of transmittal hereinafter quoted, disclose exactly what course was taken by the Government in 1850 to carry into effect the several Acts of that year relating to the California Indians:

## "THE WHITE HOUSE

"Washington

"March 3, 1923.

"My dear Mr. Raker:

"Referring to your letter of February 24th, I am sending you herewith copy of a communication and its enclosures from the Commissioner of Indian Affairs regarding the authority given George W. Barbour as a Commissioner to negotiate treaties with

the various Indian tribes in the State of California about the years 1850-51.

"Sincerely yours,

"(Signed) GEO. B. CHRISTIAN, JR.,

*"Secretary to the President.*

"Hon. John E. Raker,

"House of Representatives.

"Enclosures."

"DEPARTMENT OF THE INTERIOR

"OFFICE OF INDIAN AFFAIRS

"WASHINGTON

"16895-1923

"March 2, 1923.

"My dear Mr. Christian:

"I have the honor to acknowledge the receipt, by Departmental reference, of your letter of February 27, 1923, with inclosure from Hon. John E. Raker, House of Representatives, requesting a copy of the authority given George W. Barbour, as a Commissioner to negotiate treaties with the various Indian tribes in the State of California about the years 1850-51.

"In response there is enclosed herewith a copy of a letter dated October 9, 1850, from the Secretary of the Interior to the Commissioner of Indian Affairs, advising that with the sanction of the President, Mr. Barbour and two others are being appointed Commissioners to negotiate treaties with the said Indians.

"There is also inclosed a copy of a letter from this Office dated October 15, 1850, to Messrs. Redick, McKee, Barbour and Wozencraft, advising them of their appointment as Commissioners to negotiate trea-

ties with the California Indians, and instructing them somewhat with respect to their duties under the appointment.

"I may add that copies of the inclosed letters of October 9 and 15, 1850, have been forwarded to Mr. Raker in response to his letter of February 24, 1923, addressed to this Office.

"As requested the letter of Representative Raker is returned herewith; and a carbon copy of this response is inclosed for your convenience.

"Sincerely yours,  
 "(Signed) CHAS. H. BURKE,  
*"Commissioner.*

"3-2 jmb

"Hon. George B. Christian, Jr.,

"Secretary to the President.

"The White House.

"Inclosure 12455."

"Department of the Interior,  
 "Washington,  
 "October 9th, 1850.

"Sir :

"Upon consultation with the President and with his sanction, it has been determined to appoint Messrs. McKee, Barbour and Wozencraft Commissioners, under that Section of the Act entitled 'An Act to make appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with the various Indian tribes for the year ending 30th of June, 1851,' which appropriates \$25,000 'to enable the President to hold treaties with the various Indian tribes in the State of California.'

"The functions and salaries of these gentlemen as resident Indian Agents are suspended until their duties under this Commission are fulfilled—Messrs.

McKee and Barbour will proceed to California and in conjunction with their associate Mr. Wozencraft make such explorations of the Indian Country and such examinations into their condition and habits as circumstances may allow. The Commissioners will also be instructed to make such treaties and compacts with the Indians as may seem to be just and proper—It is also desirable that they should ascertain what are the most suitable divisions of the Country, having regard to territory and the tribes of Indians, for permanent Indian Agencies—Full reports upon all these points will be required by this Department, and when those reports are made lines of demarcation between the several Agencies will be made and points selected for the location of depots of clothing, provisions, etc., and the residence of the Agents—

“You will prepare instructions, etc., in conformity with the above.

“I am Very respectfully

“Your Obdt. Servant

“(Signed ALEX. H. H. STUART

“*Secretary.*

“The Commissioner

“of Indian Affairs.”

“Department of the Interior

“Washn. Oct. 9, 1850.

“Messrs. McKee, Barbour & Wozencraft to be appointed Commrs. under S of Act of appropt. for current & contingent expenses etc. Indn. Dept. for fiscal year ending June 30, 1850, appropriating 25000\$ to treat with Indians in California, their salaries as Indn Agts. to be suspended till duties under the Commission are fulfilled, and will be instructed as within directed—

“Recd. 9 Oct. 1850.”

“Department of the Interior,  
“Office Indian Affairs,  
“Oct. 15, 1850.

“McKee Redick

“Barbour, Geo. W.

“Wozencraft, O. M.

“Commissioners.

“Gentlemen:

“I have the honor to inclose herewith, a copy of a letter from the Secretary of the Interior, by which you will find that your functions and salaries as Indian Agents are suspended; and that you are appointed with the sanction of the President, Commissioners to hold treaties with various Indian tribes in the State of California, as provided in the Act of Congress, approved Sept. 30, 1850. Your commissions are also enclosed.

“Your compensation, as provided by law, will be eight dollars per day for every day you are actually employed, and ten cents per mile, for your travel, by the usually traveled route to your place of destination. After your arrival in the country in which your duties lie, you will be allowed your actual travelling expenses from place to place where duty may call you.

“You will be allowed a Secretary, to be appointed by you after your arrival in California, whose compensation must not exceed \$5 per day for his services; and his actual travelling expenses will be allowed. It is not probable that his services will be required for the whole time, continuously, and you will therefore employ him only for such time as may be actually necessary.

“The services of Interpreters will be indispensable in your negotiations. You are therefore authorized to employ such number and for such periods as you may find requisite confining yourselves to the smallest number for the shortest periods and for the lowest compensation that competent persons can be obtained



for. These precautions of economy are made solely with reference to the small amount of the appropriation, when compared with the great object to be attained.

"The first named gentleman of your Board, being present, has been entrusted with the duties of disbursing agent of the Commission, and the sum of \$25,000, the whole amount of the appropriation, has been placed in his hands for disbursement—the other two Commissioners together with all other expenses of the Commission will be paid by him.

"You will find on your arrival in California, Adam Johnson, Esq., Sub-Agent at San Joachim, from whom you will doubtless receive much valuable information as his residence in the country for considerably more than a year has enabled him to collect a great deal relating to the Indian tribes, their location, their manners, habits, customs, disposition towards the whites, and each other, and the extent of civilization to which they have arrived.

"Mr. Johnson will be directed to afford you all the aid in his power and give you all the information in his possession that may be of use to you in the discharge of your duties.

"The Department is in possession of little or no information respecting the Indians of California, except what is contained in the enclosed copies of papers—a list of which is appended to these instructions—but whether even these contain sufficient data to entitle them to full confidence will be for you to judge and they are given to you merely as points of reference.

"As set forth in the law creating the commission, and the letter of the Secretary of the Interior, the object of the government is to obtain all the information it can with reference to tribes of Indians within the boundaries of California, their manners, habits, customs and extent of civilization and to make such treaties and compacts with them as may seem

just and proper. On the arrival of Mr. McKee and Mr. Barbour in California they will notify Mr. Wozencraft of their readiness to enter upon the duties of the mission—the board will convene and after obtaining whatever light may be within its reach will determine on some rule of action which will be most efficient in attaining the desired object which is by all possible means to conciliate the good feelings of the Indians; and to get them to ratify those feelings by entering into written treaties binding on them towards the government and each other. You will be able to judge whether it will be best for you to act in a body or separately in different parts of the Indian country.

It is expected that you will keep a journal of your daily proceedings, and report fully to this office everything that occurs in your operations. Copies of these reports you will forward from time to time, the whole to be reserved by you for a general report, accompanied by such treaties as you may make when your mission shall have been brought to a close.

“Another commission has been authorized consisting of Messrs. C. S. Todd, Robert B. Campbell, and Oliver P. Temple, to procure information and make treaties with the Indians on the borders of Mexico. Should you meet at any time, which is scarcely to be expected, you will cooperate and act in concert, so far as may be agreed on between you; and it is requested, that whenever this may be the case there will be no misunderstanding as to your relative powers or collision in your understanding of your relative duties, it being regarded that each board is independent of the other, and it is expected that all intercourse between them will be harmonious.

“Very respectfully your obt. Servt.

“A. S. LOUGHERY

“*Actg. Commr.*

“P. S. Since writing the above, a telegraphic communication has been received from Mr. Wozen-

craft at New Orleans—and he has been notified through the same channel that his commission and a triplicate of these instructions will be sent to him at that place.”

After the issuance by the Secretary of the Interior and the Indian Commissioner of the foregoing instructions, the Commissioners appointed to negotiate treaties with the California Indians with respect to their tribal land claims set about their task, which was a serious one, and for the completion of which it was necessary for Congress to make provision in the Deficiency Appropriation Act of February 27, 1851. This Act carried an additional appropriation of \$25,000 “for expenses of holding treaties with the various tribes of Indians in California.”

The act of February 27, 1851, also provided that “hereafter all Indian treaties shall be negotiated by such officers and agents of the Indian Department as the President of the United States may designate for that purpose and no officer or agent so employed shall receive any additional compensation for such service.” (9 Stat. 586.)

This act made provision for the salaries of Indian interpreters in California.

On October 6, 1851, pursuant to the authority vested in him by the Secretary of the Interior, the said Redick McKee, Commissioner, negotiated a treaty with the Karok or Peh-tsick tribe, sixteen treaties in all being negotiated by the three Commissioners. These treaties having been negotiated in accordance with the existing law and executive instructions, were forwarded to the President through the proper departmental channels as shown by the record in this case and formally referred to the Senate by the President for ratification.

From the foregoing it is seen that Congress undertook

to deal with the Indian tribes of California in accordance with that policy which had existed since the establishment of the Government of the United States, and which policy had been given legislative sanction in 1834—that is by formally negotiated treaties.

The policy of dealing with the Indian tribes by treaty was not abandoned by Congress until 1871, and in adopting a new policy Congress did not undertake to evade the obligations which had been incurred by the United States under the old policy. Thus, the Supreme Court of the United States in the case of *Elk vs. Wilkins*, 112 U. S. 648, held that the Act of March 3, 1871, prohibiting further Indian treaties was not intended to violate Indian rights because with the act was coupled a provision that the obligation of any Indian treaty was not to be invalidated or impaired; that its utmost possible effect was to require the Indian tribes to be dealt with in future through the legislative and not through the treaty making power. (16 Stat. 566.)

## VIII

### **THE RIGHT OF THE KAROK TRIBE UNAFFECTED BY THE ACT OF MARCH 3, 1851.**

It was contended in the court below that through the failure of the Karok tribe to present their claim to the right of occupancy in their domain to the Commission created by the Act of March 3, 1851, any right the tribe may have possessed prior to that time was forfeited. An examination of the Act mentioned and its history as presented by the Honorable William W. Morrow, Judge of the United States Circuit Court of Appeals and author of the *Introduction to California Jurisprudence*, in a publication entitled "Spanish and Mexican Private Land Grants," 1923, will disclose the fallacy of this view.

The treaty of Guadalupe Hidalgo as originally agreed upon by the representatives of the two countries, contained a special article respecting Mexican land grants in the ceded territories. As this article was stricken out by the United States, on the recommendation of the President, and is not contained in the published treaties, it is here inserted for convenience of reference:

### ARTICLE X.

"All grants of land made by the Mexican government, or by the competent authorities, in territories previously appertaining to Mexico, and remaining for the future within the limits of the United States shall be respected as valid, *to the same extent that the same grants would be valid if the said territories had remained within the limits of Mexico.* But the grantees of lands in Texas, put in possession thereof, who, by reason of the circumstances of the country, since the beginning of the troubles between Texas and the Mexican government, *may have been prevented from fulfilling all the conditions of their grants, shall be under the obligation to fulfill the said conditions within the periods limited in the same, respectively; such periods to be now counted from the date of the exchange of ratifications of this treaty;* in default of which the said grants shall not be obligatory upon the State of Texas, in virtue of the stipulations contained in this article.

"*The foregoing stipulation in regard to grantees of land in Texas is extended to all grantees of land in the territories aforesaid, elsewhere than in Texas, put in possession under such grants; and, in default of the fulfillment of the conditions of any such grant, within the new period, which, as is above stipulated, begins with the day of the exchange of ratifications of this treaty, the same shall be null and void.*

"The Mexican government declares that no grant whatever of lands in Texas has been made since the second day of March, one thousand eight hundred and



thirty-six; and that no grant whatever of land, in any of the territories aforesaid, has been made since the thirteenth day of May, one thousand eight hundred and forty-six."

The striking out of this article, and certain amendments made to others by the Senate, made it necessary to send commissioners to Mexico to procure the ratification of the treaty as amended. The ratification was obtained without difficulty; but the commissioners signed a so-called protocol in which explanation was made of the changes made in the treaty, and among others, the striking out of article X. The explanation with respect to that article was that "The American Government, by suppressing the Xth article of the treaty of Guadalupe, did not in any way intend to annul the grants of lands made by Mexico in the ceded territories. These grants, notwithstanding the suppression of the article of the treaty, preserve the legal value which they may possess; *and the grantees may cause their legitimate titles to be acknowledged before the American tribunals.*"

In transmitting the treaty to the Senate, the President had made two objections to article X: First. That the public lands within the limits of Texas belonged to that State and the United States had no power to dispose of them, or to change the conditions already made. Second. With respect to land in the other territories, it was unnecessary, as all valid titles to land in such territories were unaffected by the change of sovereignty. It was subsequently objected that the provisions of the article could only serve as an effort to revive titles that had lapsed under Mexican laws.

Why, then, did the United States pay Mexico \$18,250,000, under the stipulations of this treaty? Was it for indemnity for injuries and expenses? Such a claim might have been made by the United States but it made none. We

waived whatever right we had on that score, and there was nothing for which indemnity could possibly be claimed by Mexico. Our military operations had been successful, and at every stage of their progress we had proposed a peaceful and honorable adjustment of our difficulties, without success, until further resistance on the part of Mexico was no longer possible.

The possession of the harbors on the California coast was, of course, a consideration. Was there any other? Was it for the supposed public lands in the ceded territory? It was not known that there were such lands of any material value. It had been reported that the most desirable lands in the territory had been granted away in large tracts and were held in private ownership; that fact was disclosed by the rejected article of the treaty. In reply to certain resolutions of the House of Representatives at Washington requesting information in relation to the ceded territories, the President in a message to that body on July 24, 1848, stated that the Executive Department had no means of making an accurate estimate of the public lands in these territories. He stated further, that the period since the exchange of ratifications of the treaty had been too short to enable the government to have access to, or to procure abstracts or copies of the land titles issued by Spain or by the Republic of Mexico; but that steps would be taken to procure such information at the earliest practicable time. The President stated, however, that it was estimated that much the larger portion of the land within the territory had remained vacant and unappropriated and would be subject to be disposed of by the United States. "Indeed," said the President, "a very inconsiderable portion of the land embraced in the cession, it is believed, has been disposed of or granted, either by Spain or Mexico." But, notwithstanding this favorable view of the land situation in the ceded territories enter-

tained by the President, public opinion was in doubt upon the subject. It was believed that whatever lands there were of value in the country had been already appropriated by private grants, and with respect to the remainder there had been many adverse reports by travelers and others as to their value for any purpose. It was known that a large part of the surface was broken by lofty mountain ranges, other parts were arid and dead to all forms of plant life, while other parts supported only the weird life of the Apache, the cactus and the serpent.

But still the mountains might contain valuable minerals, and the valleys productive soil. Had it all been appropriated, or was it still open to exploration and settlement? Was it, in fact, a new country for such people, for instance, as had gone into the Mississippi Valley? Was it a land for settlers?

The fact is, the United States paid Mexico for the newly acquired territory because it was the honorable and just thing to do, and because of the possibilities arising out of the undeveloped resources of the country. This territory had long been in the possession of the Mexican people, first under Spanish and later under Mexican rule, and it was reported that these people had spied out the desirable locations and appropriated them in large tracts, under a simple form of procedure, for pastoral and other primitive purposes. This was the probable fact. Whether it was or not, was a question of the utmost importance to those who wished to try their fortune in this newly acquired territory, particularly in California after the discovery of gold, when a tremendous immigration commenced to pour into the territory from all quarters of the globe.

The first step was taken when General Mason, Military Governor of California, instructed H. W. Halleck, Secretary of State (afterward General Halleck of the Civil War),

to collect together and examine all the archives of the old government of California that could be found and to report on the same. This report was made on March 1, 1849; (1st) On the laws and regulations which govern the granting or selling of public lands in California; (2nd) on the laws and regulations respecting the lands and other property belonging to the missions of California; and (3rd) on the titles of lands in California which might be required for fortifications, arsenals and other military structures for the use of the Government of the United States. (House Ex. Doc. No. 17, 31st Cong., 1st Sess.)

The next step on the part of the Government was the appointment, in July, 1849, by the Secretary of the Interior at Washington, of William Carey Jones as confidential agent to investigate and report upon the subject of land titles in California, and for that purpose to examine the archives in Monterey, San Francisco or other places where they might be found, and, if necessary, to procure copies of documents in the City of Mexico. In September, Mr. Jones arrived at Monterey, in that State, where the territorial archives were deposited, and he proceeded with his examination, visiting San José, San Francisco, San Diego and Los Angeles in search for documents and other evidences of title. In December he proceeded to the City of Mexico. After conducting an examination there for a little over two weeks, he returned to Washington, and on April 10, 1850, he presented his report to the Secretary of the Interior, who at once transmitted it to the President, and by the President it was sent to Congress. (Senate Ex. Doc. No. 18, 31st Cong., 1st Sess.) The report of Mr. Jones covers 139 pages, and in some respects it is a remarkable document. The material was gathered at distant points under rather unfavorable conditions, and, considering its scope and detail, it was obtained in an incredibly short time. The report,

itself, was carefully prepared, concise in form, and accurate in detail, and has always been referred to as an authority for the subject with which it deals. In this document Mr. Jones has incorporated a list of the private land grants in California found in the archives at Monterey. The list numbers 593 claims, but was stated not to be correct, by reason of the faulty condition of the records from which it was taken. Referring to the file of *expedientes* of grants, Mr. Jones says:

"This file is marked from No. 1 to No. 579, inclusive, and embraces the time between May 13, 1836, to July, 1846. The numbers, however, bear little relation to the dates. Some numbers are missing; of some there are duplicates—that is, two distinct grants with the same number. The *expedientes* are not all complete; in some cases the final grant appears to have been refused—in others, it is wanting. The collection, however, is evidently intended to represent estates which have been granted, and it is probable that in many or most instances the omission apparent in the archives is supplied by original documents in the hands of the parties, or by long permitted occupation."

In this report Mr. Jones foreshadowed the difficulties this government would encounter in dealing with these titles.

The next move was for legislation providing for an examination that would segregate these granted lands from the public domain. The Legislature of the State of California, at its first session, in 1849, elected John C. Fremont and William M. Gwyn United States Senators. They received their credentials in December and proceeded to Washington, but it was not until September 10, 1850, the day after the admission of California into the Union, that



they were sworn in as members of the Senate. Soon after taking his seat, Mr. Fremont presented a bill providing for the settlement of private land claims in California. Mr. Gwyn offered a substitute, and Mr. Benton of Missouri offered an amendment to the substitute. Mr. Benton's amendment provided for the registration of all land grants with a register to be appointed by the President. The location, boundaries and extent of the grants were to be determined by the Surveyor General. The amendment provided for the ordering of grants into court when suspected of being fraudulent.

Mr. Gwyn's substitute for Mr. Fremont's bill passed and became the Act of March 3, 1851. (9 Stat. 631.) It provided for the appointment of a commission of three members, to continue for three years from the date of the Act. Each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican governments was required to present the same to the commission within two years, together with such documentary evidence and testimony of witnesses as the claimant relied upon in support of his claim; and all lands, the claim to which should not be presented to the commission within two years, were to be deemed a part of the public domain. It was provided that the commissioners and the District and Supreme Courts in deciding on the validity of any claim brought before them under the provisions of the act should be governed by the treaty, the law of nations, the laws, usages and customs of the government from which the claim was derived, the principles of equity and the decisions of the Supreme Court of the United States so far as they were applicable. An agent of the United States was provided for, to look after the interests of the United States in all cases; that is to say, to see that

the public domain was not invaded by illegal or spurious grants, or grants with excessive boundaries; and the United States Attorney was also to appear for the United States for the same purpose. An appeal lay to the United States District Court, upon the petition of the United States or the claimant, from an adverse report against either. An appeal was also allowed from the District Court to the Supreme Court of the United States.

The California commission was continued in existence until March 3, 1856—a period of five years. During that time 813 claims were presented for adjudication; 514 were confirmed, and the others rejected for fraud or for such serious defect that the claim was held not established, either as a legal or equitable claim. In some cases the claims were withdrawn. The final result, before the commission and on appeal to the District Court and Supreme Court, was the confirmation of 604 cases, the rejection of 190, and 19 were withdrawn. The amount of land claimed in all these cases was more than 12,000,000 acres, or nearly 20,000 square miles. The quantity of land in the confirmed grants was less than 9,000,000 acres.

Prior to 1860, patents were issued upon all claims finally confirmed by the commission or by the District or Supreme Court, upon presentation to the General Land Office at Washington of a certificate of such confirmation and a plat or survey of the land, certified and approved by the Surveyor General. All questions concerning the survey were passed upon by the General Land Office. The delay in this department and the unsatisfactory procedure in determining the difficult questions arising upon the surveys caused Congress to pass the Act of June 14, 1860 (12 Stat. 33). This Act authorized the District Court, upon the application of either party, to order the survey of a private

land claim into court for examination and adjudication. Under this method of procedure, many surveys were ordered into court and an examination of the records will show that these final questions were as promptly determined as reasonably could be expected under all the circumstances; and that the location, extent and boundaries of the Spanish and Mexican private land claims in California, as between the government and the claimant, have long ceased to be a subject of controversy.

So much for the history of the administration of the Act of March 3, 1851, which shows conclusively that only private land grants from the Spanish and Mexican Governments were dealt with by the Commission created by that Act. Now let the Act itself be examined, the pertinent sections being as follows:

“BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That for the purpose of ascertaining and settling private land claims in the State of California, a Commission shall be, and is hereby, constituted, which shall consist of three commissioners, to be appointed by the President of the United States, by and with the advice and consent of the Senate, which commission shall continue for three years from the date of this act, unless sooner discontinued by the President of the United States.

“Sec. 8. AND BE IT FURTHER ENACTED, That each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the said commissioners when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims; and it shall be the duty of the commissioners, when the case is ready

for hearing, to proceed promptly to examine the same upon such evidence and upon the evidence produced in behalf of the United States, and to decide upon the validity of the said claim, and, within thirty days after such decision is rendered, to certify the same, with the reasons on which it is founded, to the district attorney of the United States in and for the district in which such decision shall be rendered.

"Sec. 16. AND IT IS FURTHER ENACTED, That it shall be the duty of the commissioners herein provided for to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos or Rancheros Indians."

While a statute must be strictly construed, it requires no strict construction of the Act of March 3, 1851, to restrict the authority of the Commission created thereby to the determination of private claims. On the face of the Act it clearly appears that the claims to be settled were those of *private individuals based on a right or title derived from the Spanish or Mexican government.*

It is to be noted that the Commission was not even empowered to settle the claims of the missions and those of the civilized and the Pueblo or Rancheros Indians. As to such claims the Commission was simply empowered to ascertain the facts and report the same to the Secretary of the Interior. It is plain, therefore, that the Commission had no authority to pass upon any Indian claim, whether an individual or collective claim, much less upon tribal claims, and it is believed that it can be shown that not a single claim of that nature was included among the 813 claims presented to the Commission—certainly not among the 514 claims which were confirmed.

In Section 16 of the Act of March 3, 1851, while the mission Indians, civilized Indians, Pueblo and Rancheros Indians are specifically referred to, no reference whatever is made to the nomadic Indians or those who preserved a tribal mode of life. The reason for this is plain. Under the existing law, or the Act of June 30, 1834, tribes could only be dealt with as Nations by treaty so that the Commission legally could not deal with them in the manner prescribed in the Act for dealing with individuals claiming rights in land. Furthermore, naturally no report as to tribal tenures was required of the Commission, since the mission Indians, the civilized Indians, the Pueblo and Rancheros Indians embraced all the Indians that in the nature of things could be holding land under grants from the Spanish or Mexican government. It has been shown that under the law of Spain and Mexico the nomadic Indians or tribes held no grants but merely possessed the right of occupancy in their tribal domains.

The exclusion from consideration by the Commission of the tenure by which lands were held by Indians of every class who could possibly have held land under a grant from the Spanish or Mexican government by the express requirement that every possible Indian tenure be reported to the Secretary of the Interior was, therefore, no less than an affirmative denial to the Commission of the power to pass upon the validity of any claims based upon Indian tenure, and if the Commission was denied the power to deal with the claims of the only Indians who could have held grants, surely it will not be argued seriously that it had the power to deal with tribal claims. Obviously the provisions of Section 16 of the Act of March 3, 1851, were designed by Congress to insure that the guaranty contained in the Treaty of Guadalupe Hidalgo be respected, and that the Indian



tribes be dealt with by treaty as prescribed by the Act of June 30, 1834, and subsequent acts.

That it was not the intention of Congress under the Act of 1851 to require the tribes to prove to the Commission of 1851 their property rights is manifest from the following language of the Supreme Court of the United States in *Botiller v. Dominguez*, 130 U. S. 238:

“We are unable to see any injustice, any want of constitutional power, or any violation of the treaty in the means by which the United States *undertook to separate the lands in which it held the proprietary interest from those which belonged, either equitably or by a strict legal title, to private persons.*”

This interpretation of the purposes of the Act of 1851 by the Supreme Court shows that the statute did not comprehend Indian lands, for the United States already possessed proprietary interest in Indian lands, subject only to the Indian right of occupancy.

In the case of *United States Appt. vs. Moreno*, 1 Wall. 400-405, the Supreme Court of the United States made the following statement with respect to the purpose of the Act of March 3, 1851:

“The Act of March 3, 1851, was passed to secure to the inhabitants of the ceded territory the benefit of the rights of property thus secured to them. It recognizes alike legal and equitable rights, and should be administered in a large and liberal spirit. A right of any validity before the cession was equally valid afterwards, and while it is the duty of the court, in the cases which may come before it, to guard carefully against claims originating in fraud, it is equally their duty to see that no rightful claim is rejected. No nation can have any higher interest than the right administration of justice.”

The attitude of the Government of the United States in the matter of recognizing property rights acquired by Mexicans prior to the cession of land under the Treaty of Guadalupe Hidalgo is again very clearly stated by the Supreme Court of the United States in the case cited. Speaking for the Court, Mr. Justice Swayne said:

“California belonged to Spain by the rights of discovery and conquest. The Government of that country established regulations for transfers of the public domain to individuals. When the sovereignty of Spain was displaced by the revolutionary action of Mexico, the new Government established regulations on the same subject. These two sovereignties are the spring heads of all the land titles in California, existing at the time of the cession of that country to the United States by the Treaty of Guadalupe Hidalgo. *That cession did not impair the rights of private property. They were consecrated by the law of nations, and protected by the Treaty. The treaty stipulation was but a formal recognition of the pre-existing sanction of the law of nations \* \* \*.*”

The language employed by the Supreme Court of the United States in the case of *United States, Appt. vs. Aquisola*, 68 U. S. 352-359, interpretive of the Treaty of Guadalupe Hidalgo, shows in a positive way that the United States did not intend to invoke technical requirements against Mexican Indians, or the new wards of the United States, even where they were the individual owners of private property, or the holders of individual private grants, much less against the Indian tribes. In this relation Mr. Justice Field said:

“To these observations, so just and pertinent, we will only add that the United States have never sought by their legislation to evade the obligations devolved

upon them by the Treaty of Guadalupe Hidalgo to protect the rights of property of the inhabitants of the ceded territory, or to discharge it in a narrow and illiberal manner. They have directed their tribunals in passing upon the rights of the inhabitants, to be governed by the stipulations of the Treaty, the law of nations, the laws, usages and customs of the former government, the principles of equity, and the decision of the Supreme Court so far as they are applicable. They have not desired the tribunal to conduct their investigations as if the rights of the inhabitants to the property which they claim depended upon the nicest observance of every legal formality. They have desired to act as a great nation, not seeking, in extending their authority over the ceded country to enforce forfeitures, but to afford protection and security to all just rights which could have been claimed from the Government they superseded."

The foregoing language is not consonant with the idea that Congress, in enacting the statute of March 3, 1851, intended to impose conditions upon Indian tribes which it was not within their power to fulfill in order to preserve the right of occupancy which had been confirmed in them before the acquisition of the ceded territory by the United States, and which right the Supreme Court of the United States had held to reside in the tribal wards of the United States even before the Mexican Indians came under the political dominion of the United States.

Is it to be contended seriously before this court that the laws pursuant to which the Government negotiated the sixteen treaties of 1851 were without force or effect? That the actual conduct of the Government was utterly futile? That the act of March 3, 1851, dealing with private land claims alone rendered nugatory the existing laws by which the President, the Secretary of the Interior, and the Indian

Office were governed in their dealings with the Indian tribes of California?

In view of the existing law Congress naturally did not undertake to empower the Commission created by the Act of March 3, 1851, to deal directly with the Indian tribes, which had become subject to the dominion of the United States as a result of the Treaty of Guadalupe Hidalgo, and into that act wrote nothing that was inconsistent with the policy based upon the existing law.

It has been shown that on February 27, 1851, or eight days before the passage of the Act of March 3, 1851, Congress passed an act requiring all treaties with the Indian tribes to be negotiated by officers or agents of the Indian Office of the Department of the Interior. This Act plainly manifested the intent of Congress to continue the policy which had been established in 1834. Is it to be presumed that the Act of March 3, 1851, was intended to abrogate both the Acts of 1834 and 1850 as well as the Act of February 27, 1851? The proof that Congress had no such intent is to be found in the fact that when in 1871 Congress passed an act doing away with the policy of dealing with the Indian tribes as nations by treaty it expressly provided that rights theretofore acquired by the Indians under treaties with the United States were not to be impaired.

Section 19 of the Act of March 3, 1851, also expressly provided that the facts concerning Indian claims when ascertained were merely to be reported to the Secretary of the Interior whose function it had been made under the Act of February 27, 1851, to negotiate treaties with the Indians through the agency of the Indian Office of his Department. Is it conceivable that Congress would have empowered by two contemporaneous statutes both the Commission and the

Indian Office to deal with the Indians concurrently regarding their tribal claims?

In the nature of things, it would have been impossible for the nomadic or tribal Indians to prove their claims by the documentary evidence required of those claiming grants from the Spanish and Mexican governments. What other evidence of their title or right to the occupancy of their lands could these primitive and helpless peoples offer than the fact of the actual possession thereof? The United States had solemnly bound itself by the express terms of the Treaty of Guadalupe Hidalgo to protect them against the necessity of seeking new homes. For Congress three years later to have made unreasonable demands upon them to prove their right of occupancy by the production of technical evidence before a Commission would in effect have amounted to no less than the ouster by the United States, or the guardian, of its own wards.

That Congress had no such intent as that mentioned, and that its purpose has ever been to enforce the guarantees contained in the Treaty of Guadalupe Hidalgo with respect to the Indians is conclusively shown not only by Section 16 of the Act of March 3, 1851, which denied to the Commission the power to deal with the claims of Indians, but by the Act of March 3, 1891, as well, which created a Court of Private Land Claims to settle other claims to land acquired from Mexico under the Treaty of Guadalupe Hidalgo.

Section 13 of the Act of March 3, 1891, is as follows:

"Second. No claim shall be allowed that shall interfere with or overthrow any just and unextinguished Indian title or right to any land or place."  
(21 Stat. L., 860.)

Construed together, Section 16 of the Act of March 3, 1851, and Section 13 of the Act of March 3, 1891, leave



no doubt whatever as to the intent of Congress with respect to the rights of the Indian inhabitants of the territory ceded to the United States by Mexico in 1848.

In *Minturn v. Brower* (24 Cal. 644) the Supreme Court of California had before it the question of whether the holder of a perfect title to land in California, acquired by grant from either Spain or Mexico prior to the cession of the territory by Mexico to the United States, was required, under the Act of March 3, 1851, to submit such claim of title for confirmation to the Board of Commissioners appointed under the Act; or, failing to do so within two years after the date of the Act, as therein provided, the land so claimed should be deemed as part of the public domain of the United States. The court held that the holder of such a title might, if he so elected, submit his title to be passed upon by the Board of Commissioners, but was not bound to do so. The court held, further, that the legislation of Congress was ineffectual to impair or destroy perfect titles for failure to present them to the Board of Commissioners for their examination and judgment thereon, and that the title thus vested might be asserted and maintained like other perfect titles in the courts of the country.

Again, in 1874, the same court, in *Phelan v. Poyoreno*, 74 Cal. 448, followed its previous rulings in *Minturn v. Brower*, holding, as before, that persons whose titles to lands were perfect at the time of the acquisition of California by the United States were not compelled to submit them for confirmation to the Board of Land Commissioners appointed under the Act of Congress of March 3, 1851, nor did they forfeit their lands by failure to present them to such board for confirmation; and that titles thus vested might be asserted and maintained like other perfect titles in the courts of the country.

In *Botiller v. Dominguez*, 130 U. S. 238, decided in

1889, the Supreme Court of the United States, however, held that under this statute no title to land in California, under Spanish or Mexican grants, could have any validity unless submitted to and confirmed by the commission, or, if rejected by the commission, confirmed by the District or Supreme Court of the United States. A perfect title under Spanish or Mexican laws would avail nothing unless the claim should be so confirmed.

And in *Barker v. Harvey*, 181 U. S. 481, decided in 1901, the Supreme Court reaffirmed the decision in *Botiller v. Dominguez*, holding that "the United States were bound to respect the rights of private property in the ceded territory but that it had the right to require reasonable means for determining the validity of all titles within the ceded territory, to require all persons having claims to lands to present them for recognition, and to decree that all claims which are not thus presented, shall be considered abandoned."

These cases, however, involved private claims based on grants from former sovereigns, and the facts in *Barker v. Harvey*, *supra*, are so clearly distinguishable from those of the instant case that its citation as an authority in support of the opposing contention is surprising.

In *Barker v. Harvey* a grant had originally been made to an Indian Mission by the Mexican Government. At the outset, therefore, it appears that the case involved just such a *grant* as was required by the Act of March 3, 1851, to be presented to the Commission created by that Act. And a further difference appears. After the land granted to the Mission had been abandoned by the grantee an application was made for a new grant thereof by one who desired to patent the land. The new grant was made only after an investigation during which the priest of the Mission

to whom the land had first been granted had formally declared the same to have been abandoned. Subsequent to 1851 the original grantees set up a claim to the right of occupancy in the land which they had abandoned, it being held by the court that any right which they may have possessed prior to 1851 had been lost by reason of their failure to present their claim to the Commission appointed under the Act of March 3, 1851.

In the instant case the plaintiffs and the Karok tribe of which they are members and by virtue of membership in which their claim exists, not only held no *grant* from the Mexican or Spanish government which was required to be passed upon by the Commission, but their right of occupancy which they are now asserting is one which it has been shown could not have been passed upon legally by the Commission of 1851. Furthermore, in the instant case the plaintiffs are in actual possession of their tribal domain to the right of occupancy in which they lay claim, and have been in continuous possession thereof since the time their rights therein were guaranteed by the Treaty of Guadalupe Hidalgo and confirmed by the Supreme Court of the United States. Nor is an adverse right claimed by the defendants by virtue of any grant to or title in them.

While in *Barker vs. Harvey* the Court held in effect that had Mission Indians any property rights acquired from the Mexican Government they should have been presented to the Commission of 1851, it also pointed out that the Act of 1851 required the Secretary of the Interior to report the tenure by which Mission lands were held, "those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos or Rancheros Indians."

Thus it is seen that the Court did not hold or even inti-

mate that wild or tribal Indians with naked right of occupancy should have gone before the Commission. The Court apparently drew a distinction between a right of *permanent occupancy* acquired from Mexico and the Indian right of *temporary occupancy* in lands to which the United States had full title. In discussing this phase the Supreme Court said:

"If it be said that the Indians do not claim the fee, but only the right of occupation, and therefore they do not come within the provision of paragraph 8 as 'persons claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government' it may be replied that a claim of a right to permanent occupancy of land is one of far-reaching effect and it could not well be said that lands which were burdened with a right of permanent occupancy were a part of the public domain and subject to the full disposal of the United States. There is an essential difference between the power of the United States over lands to which it has had full title and of which it has given to an Indian tribe a temporary occupancy, and that over lands which were subjected by the action of some prior government to a right of permanent occupancy for in the latter case the right which is one of private property antecedes and is superior to the title of this Government, and limits necessarily its power of disposal. Surely a claimant would have little reason for presenting to the Land Commission his claim to land and securing a confirmation of that claim, if the only result was to transfer the naked fee to him, burdened with an Indian right to permanent occupancy."

In this case Harvey and the other Indians alleged that they and their ancestors occupied the land and they offered the prior Mexican grants to Pico and Warner in support

of their rights. These Indians were therefore claiming their rights under official Government instruments and were manifestly in a different position from tribal Indians claiming under no official grants or documents and having merely a "temporary occupancy" of lands, as the Supreme Court terms it, as distinguished from "permanent occupancy."

Inasmuch as the record showed that these Indians had abandoned the land altogether the case was decided as though they had never received any rights under the grants. The Indians were eliminated from the situation. The Court plainly did not have before it a case where tribal Indians were merely occupying lands and the question of their rights in the premises. The Court in holding that Mission Indians, claiming under grants would have had to go before the Commission of 1853 did not hold that tribal Indians not claiming under grants would also have to go before the Commission.

That the decision in *Barker v. Harvey*, *supra*, never contemplated that the Commission of 1851 was competent to pass upon tribal claims appears in the body of the decision itself. Said the Court at p. 492:

"Surely a claimant would have little reason for presenting to the Land Commission his claim to land, and securing a confirmation of that claim, if the only result was to transfer the naked fee to him, burdened by an Indian right of occupancy."

In this same connection the Court further said:

"\* \* \* and it could not well be said that lands which were burdened with a right of permanent occupancy were a part of the public domain and subject to the full disposal of the United States."

On the point under consideration *Byrne v. Alas*, 16 Pac. 523, would seem to be conclusive. In this case an Indian



tribe or group of Indians in California had been in continuous, open and notorious possession and use of certain lands since 1815. The fact that they had never presented their claim to the right of occupancy to the Commission appointed under the Act of March 3, 1851, was held *not* to have impaired their right to the occupancy and possession of their lands.

It is submitted that the Ute case, *supra*, is also authority to the effect that it was not necessary for a tribe to present its tribal claim to the Commission of 1851 in order to preserve the tribal right since as late as 1880 Congress recognized the rights confirmed in the Utes by the Treaty of Guadalupe Hidalgo, notwithstanding the fact that the Commission of 1851 had not passed thereon.

## VIII

### THE LONE WOLF DECISION

Notwithstanding *Johnson v. McIntosh* (1823), *supra*, *Spaulding v. Chandler* (1895), *supra*, and the *Cramer* case, (1923), *infra*, the *Lone Wolf* case (1902) 187 Supreme Ct. Rep. (47 Law ed.) 299, is cited as authority in support of the extraordinary proposition of law that Congress may deprive the Indians of their tribal right of occupancy without compensation, notwithstanding the Vth Amendment to the Constitution of the United States and the provision therein contained that private property may not be taken for public use without just compensation.

From the decision in the *Lone Wolf* case the following language is quoted:

“Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the

judicial department of the government. Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties, and, of course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. \* \* \*

\* \* \* \* \*

“The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties are entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress, and that in a contingency such power might be availed of from consideration of governmental policy, particularly if consistent with perfect good faith toward the Indians. In *United States v. Kagama* (1885), 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109, speaking of the Indians, the court said (p. 382, L. ed. p. 230, Sup. Ct. Rep. p. 1113):

“ ‘After an experience of a hundred years of the treaty making system of government Congress has determined upon a new departure,—to govern them by acts of Congress. This is seen in the act of March 3, 1871, embodied in Section 2079 of the Revised Statutes:

“ ‘No Indian nation or tribe within the territory of the United States, shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3d, 1871, shall be hereby invalidated or impaired.’ ”

“In upholding the validity of an act of Congress

which conferred jurisdiction upon the courts of the United States for certain crimes committed on an Indian reservation within a state, the court said (p. 383, L. ed. p. 231, Sup. Ct. Rep. p. 1114):

“ ‘It seems to us that this is within the competency of Congress. These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the states and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive and by Congress, and by this court, whenever the question has arisen.

\* \* \* \* \*

“ ‘The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.’

“That Indians who had not been fully emancipated from the control and protection of the United States are subject, at least so far as the tribal lands were concerned, to be controlled by direct legislation of Congress, is also declared in *Choctaw Nation v. United States*, 119 U. S. 1, 27, 30 L. ed. 306, 314, 7 Sup. Ct. Rep. 75, and *Stephens v. Choctaw Nation*,

174 U. S. 445, 483, 43 L. ed. 1041, 1054, 19 Sup. Ct. Rep. 722.

"In view of the legislative power possessed by Congress over treaties with the Indians and Indian tribal property, we may not specially consider the contentions pressed upon our notice, that the signing by the Indians of the agreement of October 6, 1892, was obtained by fraudulent misrepresentations, and concealment, that the requisite three-fourths of adult male Indians had not signed as required by the twelfth article of the treaty of 1867, and that the treaty as signed has been amended by Congress without submitting such amendments to the action of the Indians, since all these matters in any event were solely within the domain of the legislative authority, and its action is conclusive upon the courts."

Continuing, the court held that the Indian occupancy could only be interfered with or determined by the United States, adding these significant words:

"It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race."

It would seem that the argument advanced by counsel for the defendants below is based in the main upon the following language employed in the Lone Wolf decision:

"Plenary authority over the *tribal relations* of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government." (Italics added.)

In other words, the courts are asked to construe the language quoted, in which Congress was merely said to possess

a plenary political power over the tribal relations of the Indians, in such way as to render inapplicable the rules of International Law, to nullify the constitutional guaranty of their property rights, to set aside the express stipulations of the Treaty of Guadalupe Hidalgo, and in effect to overrule innumerable decisions of the Supreme Court of the United States holding that the Indian right of occupancy is as sacred as the fee in the United States.

Undoubtedly Congress possesses the plenary power to deal with the Karok tribe politically as it may see fit. That it does has never been denied. It possesses that power just as Spain and Mexico possessed it, and undoubtedly it is a power inherent to that dominion which it acquired over the Indians of California when the United States acquired the territory in which the Karok tribe remained.

So, too, Congress possesses a plenary political power to deal as it may see fit with any individual or group of individuals subject to the laws of the United States. But of course this does not mean that in the exercise of the plenary political power inherent in it as the law making body of the United States Congress may ignore the specific guarantees of human rights contained in the Constitution which can be abridged in but one way—by constitutional amendment.

Undoubtedly, also, as declared in the Lone Wolf decision, Congress has the power to abrogate a treaty with an Indian tribe. But the language employed in the Lone Wolf decision can no more be taken as authority for the view that in abrogating such a treaty Congress may deprive the Indians of a vested property right without just compensation than it can be construed to nullify the guaranty contained in the Vth Amendment of the Constitution with respect to private property. That this was the view of Congress itself is apparent from the Act of March 3, 1871, by which the policy instituted by statute in 1834 of dealing with the



Indian tribes as nations was terminated, that Act providing:

"That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: Provided, further, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe."

Is it conceivable that such language would have been employed by Congress had Congress believed that the guarantees of the Vth Amendment to the Constitution did not apply to Indians as well as to other persons subject to the laws of the United States?

It is apparent that had the Court had in mind that the plenary political power which in the Lone Wolf decision it held to reside in Congress to deal with the Indians as it might see fit implied a complete nullification of the provisions of the Constitution and the Act of March 3, 1871, with respect to private property, it would not have gone on to say that it was to be presumed that in dealing with the Indian right of occupancy Congress would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Is it to be argued that to deprive the Karok tribe without compensation of a property right which the Supreme Court had long since held to reside in the Indians, and which has since been confirmed in them, would be dealing with that tribe in a way that a Christian people would deal with them? And this when the Constitution to which they are subject contains an express guaranty against such a deprivation?

Hereinbefore Section 13 of the Act of March 3, 1891, has been quoted which provided that no Indian claim of title

or right should be interfered with by the Court of Private Land Claims. Clearly, in 1891 Congress did not deem that it possessed the power to confiscate the Indian rights guaranteed in the Treaty of Guadalupe Hidalgo, or those confirmed in the Indians by the Supreme Court of the United States. Is the language contained in the decision in the Lone Wolf Case to be so construed as to negative the traditional policy of Congress as expressed in the Act of March 3, 1891, with respect to such rights?

The decision in the Lone Wolf case was rendered in 1902 by Chief Justice White, who, in 1895, had rendered the decision in *Spaulding v. Chandler*, *supra*. In the Lone Wolf decision the leading cases of *Johnson v. McIntosh* (1823), *supra*, *Cherokee Nation v. Georgia* (1831), 5 Pet. 1, 48; *Worcester v. Georgia* (1832), 6 Pet. 515; *United States v. Cook* (1873), *supra*; *Leavenworth, L. & O. R. Co. v. United States* (1875), *infra*, and *Beecher v. Wetherby* (1877), 95 U. S. 525, were not only not overruled but were cited with approval in support of the proposition that the Indian right of occupancy of tribal lands, whether declared in a treaty or otherwise created, was as sacred as the fee of the United States in the same lands. Is it conceivable that the same judicial mind could entertain coincidently this view and one that plenary power in Congress to deal with the Indians as it might see fit implied the power on the part of the United States as the dominant owner to deprive the Indians of their right of occupancy at will and without compensation? If such power is possessed by the United States how can the title of the Indians be as sacred as that of the United States?

To sustain the attempted interpretation of the Lone Wolf decision would be in effect to overrule practically every decision cited therein, as well as most of the pertinent cases decided before and since the Lone Wolf case. Cer-

tainly the decisions in *Johnson v. McIntosh*, *supra* (1823), and in *Spaulding v. Chandler*, *supra* (1895) cannot stand in face of any such interpretation of the law as that which has been attempted.

It is submitted that the decision in the leading case of *Leavenworth, etc., R. Co. v. U. S.*, 92 U. S. 733, completely sets at naught the suggested interpretation of the Lone Wolf decision. The case mentioned was one in which suit was brought by the United States to vacate certain patents issued to the appellant for portions of the Osage lands in Kansas. The patents were issued by the Governor of the State, conformably to certified lists furnished him by the Secretary of the Interior, the Governor assuming that the lands embraced in "the lists" had been granted by Congress to the State to aid in the construction of the appellant's railroad. The United States contended that the lands were not so granted. The court said:

"If such be the fact, it follows necessarily that the patent should be annulled, for public officers can bind the Government only within the scope of their lawful authority. This court said in *U. S. v. Stone*, 2 Wall. 525 \* \* \* 'that patents are sometimes issued unadvisedly, or by mistake, where the officer has no authority in law to grant them, or where another party should have received the patent; in such case the law would pronounce them void. \* \* \*'"

The decision in this case was to the effect that the Indians had the unquestionable right to the lands they occupied until that right should be extinguished by a voluntary cession to the Government, the court saying:

"We are not without authority that the general words of this grant do not include an Indian reservation. In *Wilcox v. Jackson*, 13 Pet. 493, the President, by proclamation, had ordered the sale of

certain lands, without excepting therefrom a military reservation included within their boundaries. The proclamation was based on an act of Congress supposed to authorize the sale of these lands but the court held that the act did not apply to the case, and then said: 'We go further and say that whenever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and *that no subsequent law, proclamation, or sale would be construed to embrace or operate upon it, although no reservation were made of it.*' It may be said that it was not necessary for the court in deciding the case to pass upon this question; but, however, this may be, the principle asserted is sound and reasonable, and we adopt it as a rule of construction. And the Supreme Courts of Wisconsin and Texas, in cases where the point was necessarily involved, have also adopted it. *State v. Delesdenier*, 7 Tex. 76; *Spaulding v. Martin*, 11 Wis. 274. It applies with more force to Indian than to military reservations. The latter are the absolute property of the Government. In an Indian reservation other rights are vested. Congress cannot be supposed to grant them by a subsequent law, general in its terms. Specific language, leaving no room for doubt as to the legislative will, is required for such a purpose." (Italics added.)

The reasoning above applies with peculiar force to the instant case. In the domain claimed by the Karok tribe there were vested rights other than those of the United States. In empowering the President to create national forests and in creating the Federal Power Commission, without reference of any kind in the Acts under which they were authorized to the Indian rights, Congress cannot be supposed to have confiscated vested rights in the land out of which the forest reserve was created.

The court further said in the case cited:

“As long ago as in *Cherokee Nat. v. Ga.*, 5 Peters 1, this court said that the Indians are acknowledged to have the unquestionable right to the lands they occupy, until that right shall be extinguished by a voluntary cession to the Government; and recently, *U. S. v. Cook*, 19 Wall., 591 (86 U. S. XXII, 210) this right of occupancy has been held to be as sacred as the title of the United States to the fee. Unless the Indians were deprived of the power of alienation, it is easy to see that they would not peaceably enjoy their possessions with a superior race constantly encroaching on their frontier. With the ultimate fee vested in the United States coupled with the sole right to buy that right, in case the Indians were willing to sell, they were safe against intrusion if the Government discharged its duty to a dependent people.”

Here, then, is an unequivocal declaration by the Supreme Court that though Congress may extinguish the Indian right by the exercise of its plenary power it may not do so without making compensation, and the decision in which this declaration appears is cited with approval in the *Lone Wolf* case which has been cited as authority to the contrary.

The court further said:

“The United States has frequently extinguished the Indian title, to make room for civilized men, the pioneers of the wilderness, but they never engaged in advance to do it, nor was constraint, in theory at least, placed upon the Indians to bring about their acts of cession. This grant, however, if it took effect on the Osage lands, carried with it the obligation to extinguish the Indian right. This will be conceded, if a complete title to them were granted; but it is equally true if only the fee subject to that right



passed to the grantee. It would be idle to grant what could be of no avail, unless something be done which the grantee is forbidden to do but which the grantor has power to accomplish. And this applies with peculiar force to a grant like this intended to be of immediate practical benefit to the grantee. The lands were expected to be used in the construction of the road as it progressed, but no one would buy them or even loan money upon them, so long as the Indian right of occupancy attached to them. The grantee was not at liberty to negotiate with the Indians at all, but the United States might, by treaty, put an end to that right. As Congress cannot be supposed to do a vain thing, the present grant of the fee would be an assurance to the grantee that the full title should be eventually enjoyed. This would be, in effect, a transfer of the possessory right of the Indians before acquiring it, a poor way of observing the Treaty of 1825. How could they treat on an equality with the United States under such circumstances? They would be constrained to sell, as the United States were obliged to buy. Although it might appear that the sale was voluntary, it would, in fact, be compulsory. Will the court, in the absence of words of unmistakable import, presume that Congress intended to do an act so injurious to the Indians? The statute does not evince such a purpose and yet it is not difficult to express it. If Congress really meant that this grant should take effect in the Osage country, on the surrender of the Indian title it would have so declared. \* \* \*

So, too, it may be said, if Congress had meant that the Acts empowering the President to create forest reserves and creating the Federal Power Commission were intended to have the effect of divesting the Indians of their possessory right, Congress would have so declared.

There can be no doubt as to the right of the United

States to dispose of the fee of lands to which the Indian title has not been extinguished, though the fee remain charged with the Indian right of occupancy.

Beecher v. Wetherby, 95 U. S. 517.

Buttz v. Nor. Pac. R. R. Co., 119 U. S. 55.

Lattimer v. Poteel, 14 Pet. (U. S.) 4.

Nor as to the right of the United States to extinguish the Indian title by the constitutional exercise of the right of eminent domain.

Johnson v. McIntosh, *supra*.

U. S. v. Alaska Packers' Assoc., 79 Fed. 152.

Cherokee Nation v. So. Kans. R. Co., 135 U. S. 641.

Buttz v. Nor. Pac. R. R. Co., 119 U. S. 55.

Atlanta, etc., R. Co. v. Mingus, 165 U. S. 45.

In the instant case however, Congress has neither attempted to dispose of the fee of Indian lands, nor has Congress attempted to exercise the right of eminent domain. It is apparent that it could not be consistently claimed that the fee remained in the United States, uncharged with the Indian right, were it also contended that Congress had disposed of the fee. Nor could it well be argued that Congress had acquired the fee uncharged with the Indian right by virtue of the exercise of its plenary political power were it also contended that the Indian title had been extinguished by the exercise of the right of eminent domain. The entire argument of opposing counsel, therefore, comes down to the simple proposition that though the Supreme Court of the United States has repeatedly confirmed the Indian title, both before and since the rendition of the Lone Wolf decision, by virtue of that decision and that decision alone the Indian right was one that could be con-

fiscated, and the Indian title was one that could be extinguished at will by Congress. From this position on the part of the defendants below there is no escape.

This position is utterly inconsistent with another line of decisions in which it has been held by the Supreme Court that while the United States undoubtedly has the right to transfer Indian lands by direct grant, or, if not actually occupied by Indians and there is no positive law to the contrary, under general land laws, in either case the grantee takes subject to the Indian title, and, it seems, at the risk of its subsequent confirmation by the government.

Clark v Smith, 13 Pet. (U. S.) 195.

Kinney v. Clark, 2 How. (U. S.) 76.

Gaines v. Nicholson, 9 How. (U. S.) 356.

Beecher v. Wetherby, *supra*.

Buttz v. Nor. Pac. R. R. Co., *supra*.

St. Paul, etc., R. Co. v. Phelps, 137 U. S. 528.

U. S. v. Thomas, 151 U. S. 577.

Mo., etc., R. Co. v. Roberts, 152 U. S. 114.

Minnesota v. Hitchcock, 185 U. S. 378.

Langford's Case, *supra*.

St. Paul, etc., R. Co. v. Dudley, 85 Fed. 82.

Cal., etc., Land Co. v. Worden, 85 Fed. 94.

U. S. v. Oregon Cent. Mil. Road Co., 103 Fed. 549.

It is impossible to see how if Congress cannot even convey land to which the Indian title attaches free of that title until the same is extinguished, and if a grantee from the Government itself must take subject to the Indian title, that the Lone Wolf case taken alone can be construed to empower Congress to extinguish the Indian title without compensation. That the courts have held no such view is also apparent from the Ute Case, Ct. Cl. No. 30360, decided May 23, 1910, eight years subsequent to the Lone Wolf case.

In the Ute Case the facts were that the Utes claimed the right of occupancy by virtue of the Treaty of Guadalupe Hidalgo of the tribal domain of which they were in possession when the territory including their domain was ceded to the United States. Several treaties were entered into between the Utes and the United States subsequent to the date of cession, in one of which the United States agreed for the benefit of the Utes to dispose of certain lands to which the Ute claim attached, and which the Utes no longer required. This land was to be sold by the United States as public land and the Utes were to be compensated therefore at the rate of \$1.25 per acre. Instead of selling all the land covered by the treaty as public land, the Government created out of a part of it a forest reserve. The Utes brought suit against the United States in the Court of Claims and recovered \$1.25 per acre for all the land which had been converted by the Government into a forest reserve. In discussing the right of the Indians to compensation for the right of occupancy of which they had been deprived by the United States, the court said:

“While it may be true that the Indian title of the plaintiffs to any territory prior to the treaty of 1863 was not such a title as the defendants would recognize yet the plaintiffs were located within this territory and had the usual claim of occupancy of other Indians. Their claim was considered of such importance that the defendants, during the year following the Guadalupe Hidalgo treaty, entered into a treaty with them and secured from them a concession for the right of free passage through their territory. (9 Stats. 984.) By the treaty of 1863 (13 Stats. 673), the defendants considered these claims to territorial occupancy of sufficient importance to obtain from them a cession of all ‘claim, title, etc., to lands within the territory of the United States,’ excepting

certain lands which were set apart to them as their hunting grounds. By the treaty of 1868 (15 Stats. 619) the reservation in question was set apart to the plaintiffs, and by the third article of the treaty the plaintiffs relinquished 'all claims and rights in and to any portion of the United States or territories except' such reservation. Even if we may admit that they had no valid title to any lands, yet they claimed some title and honestly claimed it, and the yielding of such a claim to a party who wishes to purchase it is a good consideration."

Here it is to be noted that compensation was made to the Indians for lands charged with their right of occupancy which lands were entirely surplus in so far as their needs were concerned and the actual possession of which had been surrendered to the United States.

It is apparent from the decision in the Ute case that an act of Congress creating a forest reserve out of Indian lands did not constitute an extinguishment of the Indian title, and that Congress was not deemed to possess the power to deprive the Indians of a property right without just compensation, notwithstanding the plenary political power which it had previously (1902) been held in the Lone Wolf case to possess.

Finally in the Cramer case, decided by the Supreme Court of the United States February 19, 1923 (Adv. Ops. Oct. Term, 1922) the possessory right of the Indians was recognized in the most unambiguous language. Said Sutherland, J., rendering the opinion of the Court:

"Congress itself, in apparent recognition of possible individual Indian possession, has, in several of the state enabling acts, required the incoming state to disclaim all right and title to lands owned or held by any Indian or Indian tribes. See Act of February 22, 1889, 25 Stat. at L. 676, chap. 180, sec. 4,



Para. 2; July 16, 1894, 28 Stat. at L. 107, chap. 138, sec. 3, Para. 2."

Elsewhere in the same opinion it was said that to hold that Indians had acquired no possessory rights in the land on which they had settled to which rights the government would accord protection, would be contrary to the whole spirit of the traditional American policy toward these dependent wards of the nation, and continuing, said: "The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive. The right, under the circumstances here disclosed, flows from a settled governmental policy."

In the Cramer case the controversy arose over the right of an individual Indian to the occupancy of a definite parcel of land of which he was in possession, actually using the same for agricultural purposes. It is not to be presumed, however, that the logic of the Cramer decision does not apply to a tribal holding as well as to an individual holding. Of necessity the rights of an individual tenant as such must be confined to a definite parcel of land, but in the case of a tribe the nomadic habits of the group and its communal system of life and land tenure preclude individual holdings. All that can be done in the nature of the case of a tribe is to confine its rights to an area or domain. The decision in the Ute case clearly recognizes this principle and would seem to be conclusive authority to the effect that it is not necessary for a tribe to do more than occupy its domain generally in order to preserve its title to the right of exclusive occupancy and possession.

So much for the judicial view with which the executive view has hitherto been in complete accord. In the answer of the United States to the British Memorial, 1914, in the celebrated Cayuga Indian case now pending before the

American-British Claims Arbitration, at p. 11 the Department of State said:

"The right of domain, which vested in a nation the ultimate fee to the land, carried with it the exclusive right of acquiring from the various Indian tribes inhabiting it their rights to the soil, which were considered as limited to a right of use or occupancy of the lands respectively used by such tribes for their hunting grounds. This limited right of use or occupancy might be lost by the Indian tribes through abandonment, or forfeited by their engaging in war against the sovereign; and it might be and in some instances was extinguished by purchase from the Indians by persons authorized by the sovereign. This dominant right in a sovereign to extinguish the Indian right to use or occupy lands, of which the ultimate fee is in the sovereign, is commonly called the right of *preemption*. It precludes not only other powers, but also the subjects of the sovereign, without his express authority, from acquiring the Indian right of use or occupancy of lands."

In the appendix to the Answer of the United States in the Cayuga Case, the policy of the American Government with respect to the dependent Indian tribes is reviewed at length. Referring to the conduct of the Government of the United States in a pronouncement to the British Government relating to the negotiation of the Treaty of Ghent, the American Commissioner said:

"It is this example which the United States since they became by their independence the sovereigns of the territory, have adopted and organized into a political system. Under that system the Indians residing within the United States are so far independent that they live under their own customs and not under the laws of the United States; that their rights upon the lands where they inhabit or hunt are se-

cured to them by boundaries defined in amicable treaties between the United States and themselves; and that whenever those boundaries are varied, it is also by amicable and voluntary treaties, by which they receive from the United States ample compensation for every right they have to the lands ceded by them. They are so far dependent as not to have the right to dispose of their lands to any private persons, nor to any Power other than the United States, and to be under their protection alone, and not under that of any other Power. Whether called subjects, or by whatever name designated, such is the relation between them and the United States. That relation is neither asserted now for the first time nor did it originate with the Treaty of Greenville. These principles have been uniformly recognized by the Indians themselves, not only by that treaty, but in all the other previous as well as subsequent treaties between them and the United States.

“The Treaty of Greenville neither took from the Indians the right, which they had not, of selling lands within the jurisdiction of the United States to foreign governments or subjects, nor ceded to them the right of exercising exclusive jurisdiction within the boundary line assigned. It was merely declaratory of the public law, in relation to the parties, founded on principles previously and universally recognized.”

In the face of such language is the interpretation of the Lone Wolf decision put forward by Counsel for defendants below to be seriously considered by this court?

If so, what is to become of the solemn declaration by the Department of State to Great Britain that the Indians receive from the United States “*ample compensation for every right they have to the lands ceded by them?*”

## IX

**CONGRESS HAS NEVER EXERCISED ITS PLE-  
NARY POWER WITH RESPECT TO THE  
DOMAIN OF THE KAROK TRIBE.**

The argument of counsel for the defendants in the lower court in support of the interpretation of the Lone Wolf decision hereinbefore discussed, was based on the assumption that Congress had in fact exercised plenary political power to deal with the Karok tribe and the tribal property as it might see fit. This assumption is not warranted by the facts.

It has been shown that in 1834 an Act was passed by Congress requiring that all agreements with the Indian tribes as such respecting their lands be embodied in treaties or conventions, and that pursuant to that Act the policy of dealing with the Indian tribes as nations continued until 1871. It has also been shown that in 1851 an Act was passed by Congress requiring all treaties with the Indian tribes to be negotiated by agents of the Indian Office of the Department of the Interior. Presumably, therefore, when the unratified treaty of October 6, 1851, was negotiated and transmitted by the President to the Senate for ratification in accordance with the existing law, the Indian Office, the Secretary of the Interior and the President believed that the title of the Karok tribe had not been extinguished.

It is apparent that if the Karok title had not been extinguished in 1851 it was not extinguished by an unratified treaty, since no contract came into being as the result of the treaty which was attempted to be negotiated by the Government. It must be conceded, therefore, that if the Karok tribe had any title, right, or claim to their tribal domain prior to October 6, 1851, that title remained unaffected by

the abortive attempt of the Government of that year to extinguish it.

The Supreme Court has held that on the extinction by the United States of the Indian title to land occupied by an Indian tribe the land becomes at once a part of the public domain without further legislation, unless by the treaty by which the Indians parted with their title or by some law a different rule is made applicable to the particular case.

See U. S. v. Payne, 2 McCrary (U. S.) 289  
8 Fed. Rep. 583.

Gates v. Clark, 95 U. S. 204.

In the instant case, however, there has not only been no treaty by which the title of the Karok tribe was extinguished, but there has been no law enacted by which the tribal domain has been converted into public domain of the United States.

March 3, 1891, Congress empowered the President to set apart and reserve certain of the public lands as forest reservations. The Act provided that he might "set apart and reserve, in any State or Territory having *public land bearing forests, in any part of the public lands* wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations." (Italics added.)

Clearly the President was not empowered by the Act of 1891 to set apart Indian lands, or lands to which the Indian title attached, since under the existing law such land was not public land or any part of the public domain.

Not only did the Act of 1891, which merely empowered the President to create forest reservations out of existing public lands, not authorize the President to confiscate the Karok domain which was not public domain, but at that time the law forbade the acquisition of public lands even under



general land laws before the Indian claims covering it had been extinguished.

See Preston v. Browder, *supra*.

Danforth v. Thomas, *supra*.

Danforth v. Wear, *supra*.

McIver v. Ragan, 2 Wheat. (U. S.) 25.

Patterson v. Jenks, 2 Pet. (U. S.) 217.

Mitchell v. U. S., 9 Pet. (U. S.) 711; 15 Pet. (U. S.) 52.

Lattimer v. Poteel, 14 Pet. (U. S.) 4.

Thredgill v. Pintard, 12 How. (U. S.) 24.

Hot Springs Cases, 92 U. S. 289.

Obviously, therefore, no officer of the United States—not even the President—could lawfully set apart land charged with the Indian right of occupancy as public land, or convert Indian lands into public land until the Indian title had been extinguished.

The fact that officers of an executive branch of the Government *cannot without express authority conferred by act of Congress dispose of Indian lands to individuals while the Indians are in actual possession and their right of occupancy has not been extinguished*, is clearly held in the case of United States vs. La Chappelle, 81 Fed. Rep. 152.

It appears from the facts in this case that an Indian chief named Moses, in 1884, undertook to make an agreement with the Government whereby the Indians in the Columbia reservation in Washington territory, for a large sum of money, agreed to move to another reservation. The Columbia reservation was to be open to settlement except that any Indians desiring to remain might do so, and lands not exceeding 640 acres would be allotted to each Indian family. Certain Indians living on the reservation, who did not recognize the authority of Moses, refused to be bound by this agreement, but indicated a willingness to make a

similar agreement on their own account. The position of these Indians was stated to the Government's Indian Agent by a young chief by the name of Long Jim, who, the court found from the evidence, "by his appearance and conduct has shown himself to be of more than average intelligence for an Indian and also a man of high spirit and dignified bearing." In responding to the overtures of the Government Agent, Chief Long Jim said:

"I and my people are upon the soil which has always been our home and the home of our ancestors for many generations. We do not wish to remove. We do not have to select land for we now occupy the land which has always been in our possession. We have no disposition to interfere with the white people, and we wish to live in peace, and maintain friendly relations with the Government at Washington, but to do as you request would be displeasing to the Great Spirit."

The attitude of the Indians was incorrectly reported to the Government by the Indian Agent who represented that the Indians were "obstinate and unmanageable." As a matter of fact these Indians had always been thrifty and able to maintain themselves without annuities from the Government. Beside fishing and hunting they had engaged in stock raising, and had plowed and cultivated sufficient land to provide winter feed for their stock, and corn and vegetables to supply their own needs. Their houses and improvements were sufficient for shelter.

But the Government acted on the representation of its Indian Agent, and without making any provision for the Indian occupants the land was opened for settlement. Certain white men who attempted to settle on the lands were resisted by the Indians who were thereupon forcibly removed by United States troops and imprisoned. During

their imprisonment white settlers seized on the Indian land and filed homestead declarations which were accepted.

The Government upon learning the truth as to the position of the Indians in the matter, instituted contest proceedings in the land department, cancelled the entries made, and brought suit to oust the settlers from the possession of the land, even though they had spent considerable sums in improving it.

The Federal Court held that the lands in question never became part of the public domain which could lawfully be taken up under the homestead law, and that neither by estoppel against the Government nor as bona fide purchasers had the settlers acquired any rights to hold the lands. The Court further held that the doctrine of estoppel could not be applied to give one private individual an advantage over another, or to divest existing rights of individuals without their consent.

In the course of his decision Judge Handford said:

“A great deal of trouble to the Government and to the band of Indians and to the defendants might have been avoided if the agent had been able to appreciate the diplomacy of Long Jim’s oration and had conveyed to the Indian Department the idea which Long Jim intended should be conveyed—that is, that he meant to assert the rights of his people; that he repudiated the action of Chief Moses in assuming to make a contract for them, but for the sake of peace they were willing to make a new agreement if the government would recognize their right to act for themselves.”

Regarding the necessity for definite law providing for the disposition of Indian rights Judge Handford said:

“\* \* \* The laws of the United States and the policy of the Government have from the earliest

times recognized the Indians' right of occupancy until the same has been formally relinquished. I think that Congress has the power and may dispose of lands in the possession of Indians without their consent. But, without authority expressly conferred by an act of Congress, officers of the executive branch of the Government cannot dispose of lands to individual citizens while the Indians are in actual possession, and their right of occupancy has not been extinguished. The position of the defendants is, in my opinion, untenable for another reason. The Supreme Court has so often decided that it is the right and duty of the Secretary of the Interior to cancel private entries of public lands whenever through mistake or inadvertence, or when the land is for any reason not subject to each entry, that the question is no longer open for discussion and the applicability of the rule on this subject to the cases on trial is, to my mind, apparent."

Elsewhere in the same decision the court further emphasized the rights of Indian occupants in the following vigorous language:

"The law imposes upon the secretary of the interior, and not upon the Indians, the duty of selecting lands for their use; and the President was not authorized to restore any part of the Columbia reservation to the public domain, and to open the same for settlement under the homestead law, until after selections for the use of the Indians had been made. The proclamation of the President opening the reservation to settlement, having been issued prematurely, may have deceived the defendants as to their rights, but it could not on that account have the effect to defeat the prior and superior rights of the Indians to remain in the occupation of their habitations and the quantity of land deemed by Congress to be necessary for their use. The duty of the secretary of the interior prescribed by the act of Con-

gress could only be discharged by making the selections of lands for the Indians, and, not having been previously discharged, it remained to be performed after the proclamation.

"I place my decision upon the ground that the lands claimed by the defendants have never become part of the public domain, which could be lawfully taken by settlers under the homestead law. The law authorizes settlers to take only unoccupied public lands, to which the Indian title had been extinguished. Rev. St. U. S. Secs. 2257-2289. Even if the president's proclamation be regarded as an authoritative declaration that the Indian title had been extinguished, and though it be conclusive upon the Indians, still the continued occupation of the land by the Indians was founded upon natural right, and their rights were recognized by the law; so that their possession amounted to a legal appropriation for their use, and on that account, by the terms of section 2289, it is not land subject to be taken under the homestead law.

"The loss which the defendants must suffer is serious, and is to be regretted, and yet they are not in a situation to claim the rights of bona fide purchasers, without notice. The possession of the Indians, prior to the initiation of their settlements, had been actual, visible, continuous, and notorious. The testimony shows that other citizens had seen that the lands in controversy were good, and desired to take the same, but were deterred by the possession of the Indians; and from the time Mr. La Chappelle made his first attempt to initiate a settlement, until the present time, the Indians have been active and diligent in asserting their rights, and giving notice thereof. An element of actual bad faith on the part of this defendant is shown by his own admission that, while the Indians were in prison, he



took possession of their growing crops, and afterwards garnered the same for his own use. In seeking to acquire the lands which they now claim, each of the defendants voluntarily entered into a controversy with the Indians, assuming the risk of a total loss of their improvements; and the consequence of their failure to defeat the Indians in the controversy affords no legal ground for trampling down superior rights."

Acting apparently under the misapprehension that the Karok domain was public land, the President on May 6, 1905, by Proclamation, attempted to set apart and reserve that portion of the Karok tribal domain now constituting the Klamath National Forest as a public reservation, defining the limits thereof in his proclamation. But since it has been shown that the setting apart of this land as a public reservation was not only not authorized by the Act of 1891, but was contrary to the law of the United States, the President's action was without the slightest legal effect upon the title of the Karok tribe. Consequently, it may be said that while the loss which the United States may sustain by reason of the improvements which it has made to the Klamath National Forest may be serious, yet that does not justify the confiscation by the United States of the property rights of the Indians, since such loss as the United States may sustain will result from a mistake of the President and not from the fault of the Indians.

Nor did the Act of 1920 creating the Federal Power Commission in any way deal with the Karok tribal domain. It simply empowered the Commission to deal with National reservations. Since no part of the Karok domain had been legally converted into public domain, or into a National reservation, the Act of 1920 cannot, therefore, be construed as an act on the part of Congress through which its plenary power over the Karok tribe, and its property, was exercised.



Thus, it is seen that even had Congress the power to confiscate, or to extinguish without compensation, the title of the Karok tribe, it has not exercised that power, and that the Karok title, such as it was from the first, remains intact. This being so, the argument based on the Lone Wolf case which was put forward in the lower court, even if a valid one, is not applicable to the facts in the instant case.

Again, if under the decision in the La Chappelle case, *supra*, the Secretary of the Interior had no power to admit entries to land that was not public land because the Indian right of occupancy had not been extinguished, clearly the Secretary of Agriculture has no power to subject land to which the Indian right of occupancy attaches to use as a forest reserve, and the Federal Power Commission has no right to grant privileges therein.

## X

### THE PLAINTIFFS MAY BRING SUIT IN THEIR OWN NAMES AS MEMBERS OF THE KAROK OR PEH-TSICK TRIBE.

In *Montoya v. U. S.*, 180 U. S. 266, an Indian tribe is defined as follows:

"By a tribe we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."

In the instant case the facts alleged with respect to the existence of the Karok tribe, which are undenied, must be taken to satisfy the foregoing definition of a tribe.

In *Stephens v. Cherokee Nation*, 174 U. S. 445, *Choctaw Nation v. Robinson*, *Id.*, *Johnson v. Creek Nation*, *Id.*, and *Chickasaw Nation v. Wiggs*, *Id.*, the social unit of the In-

dian tribe was distinctly recognized and given a legal status in the United States in the following language:

"The Indian tribes have always been recognized as distinct communities, and have been permitted to a large extent to make and enforce the laws for their own government. \* \* \*"

And it has ever been the policy of the Government to leave to the Indians as far as possible the regulation of their domestic intercourse.

See *Gray v. Coffman*, 3 Dill. (U. S.) 393.

And it has been held repeatedly that the courts of the United States will take judicial notice of the tribal laws and customs of the Indians in so far as they affect Indian property rights.

See *Talton v. Mayes*, 163 U. S. 376.

It is clear that the descent of Indian lands is cast according to tribal laws even when the said lands are held in common.

See *Jones v. Meehan* 20 S. Ct. 1; 175 U. S. 1.  
*Brown v. Steele*, 23 Kans. 672.  
*O'Brien v. Bugbee*, 46 Kans. 1.  
*Hannan v. Taylor*, 57 Kans. 1.  
*Old Settlers v. United States*, 145, U. S. 427.  
*Cherokee Intermarriage Cases*, 203 U. S. 76.  
*United States v. Cherokee Nation*, 203 U. S. 131.  
*Stephens v. Cherokee Nation*, 174 U. S. 451.

Apparently there has been no serious attempt to define the estate which the Indians with title to a mere right of exclusive occupancy and possession have in their lands. Yet, that right, being an interest in real property is itself real property, and where one owns real property he must neces-

sarily possess an estate therein since the term *estate* in its broadest sense means the condition or circumstances in which the owner stands with reference to his property.

See 2 Bl. Comm. 103.

2 Min. Inst. 71.

Archer v. Deneale, 1 Pet. (U. S.) 585.

Lambert v. Paine, 3 Cranch. (U. S.) 97.

The explanation of the failure of the courts in dealing with the Indian right of occupancy to define the Indian estate is due, it is here suggested, to the fact that two different estates arise out of this right where it exists—one in the tribal group or community as such, and one in the individual members of the tribe. As a consequence of this duality of interest great confusion has arisen through the attempt to define the interest of the Indians as if but one interest or estate in the property under consideration existed.

In *United States v. Cook*, 19 Wall. 504, 22 L. Ed. 211, it was held that the Indians had all the rights of occupancy of tenants for life. See also *Leavenworth, etc., R. R. Co. v. United States*, 92 U. S. 733. But in that decision clearly the court had in contemplation as the owner of the interest not an individual Indian but a group or tribe of Indians possessing a tribal right of occupancy and actually occupying the land.

Undoubtedly there is a legal analogy between the interest of a tribe in its tribal lands and the interest of a life tenant, since either is entitled to the occupation and possession of the land for life, the life of a tribe being determined by the persistence of two or more members. But the analogy is by no means complete for it has never been suggested that an Indian tribe might abandon its lands and convey its right of occupancy and possession

*inter vivos* to others without the consent of the dominant owner, or the owner of the fee which is the United States. It is clear that in order for a tribe to preserve the tribal title the tribe must continue to occupy, actually or constructively, its lands, a condition which makes the tribal estate not a life tenancy but an estate upon condition.

“An estate upon condition is one which is made to vest, to be enlarged or defeated, upon the happening or not happening of some event.”

Raley v. Umatilla County, 15 Ore. 179; 3 Am. St. Rep. 142.

See also Laberee v. Carleton, 53 Me. 213.

In Adams v. Oregon Knob Copper Co., 4 Hughes (U. S.) 593, 7 Fed. Rep. 638, estates upon condition are clearly defined. In that case it was said by the court:

“The doctrines of estates upon condition seem to have been originally derived from the feudal law. A tenant was under obligation to render continuous service, and if he neglected to perform his service the lord could, by writ of cessavit, obtain possession of the fief, as such continuous service was the consideration of the grant of the estate.”

In respect to an estate upon condition the condition may be a condition precedent or it may be a condition subsequent. A condition precedent is, as the term implies, such as must happen or be performed before the estate dependent upon it can arise or be enlarged, while a condition subsequent is one that, when it does or does not happen, is or is not performed, as the case may be, defeats the estate.

See Winthrop v. McKim, 51 How Pr. (N. Y.) 327.

Raley v. Umatilla County, *supra*.

The condition attached to the Indian tribal estate is, therefore, a condition subsequent since the title of the tribe to the right of perpetual exclusive occupancy and possession reverts to the United States either upon the death or extinction of the tribe or the failure of the tribe to occupy its domain.

It is to be concluded, therefore, that so long as the Karok tribe persists and occupies its domain there remains in it title to an estate upon condition in the land constituting the immemorial tribal domain, in which land the tribe has all the rights which tenants for life have in the property of the remainderman.

See *Cook v. United States*, *supra*.  
*Brown v. Belmarde*, 3 Kans. 41.

There remains to be considered the estate of the individual tribal member, or in the instant case that of the appellants.

Bledsoe, citing many authorities, in his treatise on Indian Land Law, says:

"All tribal lands were held by the members of the tribe in common. In the first half of the nineteenth century individual rights of occupancy were conferred upon members of certain tribes as to particular parts of the tribal domain. This was a segregation of the right of occupancy rather than a setting apart in allotment of a particular tract or parcel of land to a member of the tribe."

See also full discussion of the tribal system of land tenure in the Handbook of American Indians, Bulletin 30, Bureau of American Ethnology, Smithsonian Institution, in which the nature of that system will appear.

In *Chambers et al. v. Harrington*, 111 U. S. 350, the court said that a thing is said to be held in common



when there are more owners than one—a definition applicable to several forms of collective ownership.

With respect to collective ownership again great confusion is to be found not only among the legal text writers and lexicographers, but in the decisions of the courts themselves, and especially does one look in vain in the encyclopedia of the law for proper distinctions under the headings of joint tenancy, tenancy in common, the individual interest of the commoner in the right of common, and the interest of the member of a community in the communal estate or communistic property. Yet, it is apparent from the most cursory study of the law that a broad distinction is to be drawn between one who is a commoner by virtue of membership in a community, and one who is a commoner by virtue of the mere right of common as known to the law. On this point Professor Dicey says:

“Whenever men act in concert for a common purpose, they tend to create a body which, from no fiction of law but from the very nature of things, differs from the individuals of whom it is constituted.” (Law and Opinion in England, p. 155.)

“That,” he adds, “is a fact which has received far too little notice from English lawyers.”

And referring to Dicey’s statement, Carr in his treatise on Collective Ownership, says:

“Had this fact been recognized earlier, it must have exercised a remarkable influence upon the history and principles of collective ownership.”

The social system of the commune, or the community system which still exists among the Indians and is retained by the Karok tribe, is clearly communism in the traditional English sense, or in the scientifically exact sense of the word, the word commune in Middle English

being the form of common. Thus, communal rights, or rights in common, may be said to be such as belong to, or are produced by the social environment of a primitive society composed of communes. In view, therefore, of the proper distinction to be drawn between one who is a commoner by virtue of membership in the primitive social unit of the commune, and one who is a commoner merely by virtue of the right of common as known to the law, it becomes necessary to consider the law of communal ownership in its relation to the appellants in order to determine their rights in the tribal or communal property.

Oddly enough the appearance of communism among the English colonists of North America was co-eval with the first settlers, one of the provisions in the oldest American charter (1606) being that there should be a common storehouse in which the community products should be kept and from which each commoner should receive according to his needs. Jamestown lived under this scheme for five years; and the Pilgrims of New England adopted similar arrangements, for long holding land in common. Of this custom among them the Boston Common is a survival.

Many modern examples of communal or communistic ownership in this country may be cited to show that the institution is one which is fully recognized by the law of the United States as existing among others than the aboriginies.

See *Haps v. Hewitt, et al.*, 97 Ill. 498.

*Order of St. Benedict of New Jersey v. Albert Steinhauser, et al.*, 234 U. S. 640.

Notes on Communistic property contained in 8 L. R. A. (U. S.) 909, and 52 L. R. A. (U. S.) 459.

Also *The Civil Law and The Church*, Lincoln, with full account of the Amana Society, the Har-

mony Society, Oneida Community, Separatists, Shakers, etc., etc.

In *Stephens v. Cherokee Nation*, 19 S. Ct. 722, 174, U. S. 445, 43 L. Ed. 1041, it was said by the court that "the Indian tribes have always been recognized as distinct communities, \* \* \* and are like *all other communities* within the territory of the United States, subject to the paramount authority of Congress \* \* \*."

From the foregoing language it is to be concluded that the law which pertains to other communities in the United States must be taken to apply to the Indian tribal communities.

While there can be no doubt that communal ownership has been an established institution of the Common Law since the earliest times, and that it is presently recognized in the system of jurisprudence of the United States, the fact remains that there is little modern authority with respect to the legal incidents of individual ownership in community property. What authority exists, however, is unanimous in one respect which is that the right of the commoner to be maintained in the enjoyment of his privileges in the communal estate and secured in the possession of those privileges is no less well established than that of the tenant in common despite other differences between the two. In these respects the analogy between them is complete.

"Tenants in common are such as hold by several and distinct titles, but by unity of possession, because none knoweth his own severalty, and therefore they all occupy promiscuously."

2 Black. Comm. 191, quoted in *Hunter v. State*, 60 Ark. 312.

*Griswold v. Johnson*, 5 Conn. 363.

*Gittings v. Worthington*, 67 Md. 139.

Silloway v. Brown, 12 Allen (Mass.) 30.  
Tilton v. Vail, 42 Hun. (N. Y.) 638.

Possession under a tenancy in common is *per my* and not *per tout*, and as each tenant owns an undivided share, he cannot know where that fraction is until a division has been made.

See Taylor v. Millard, 118 N. Y. 244, 6 L. R. A. 667.

"Each is entitled before severance to an interest in every inch of the soil."

Martin v. Bowie, 37 S. C. 102, 15 S. E. 736.

"But no one is entitled to the exclusive possession of any particular part of the land, each being entitled to occupy the whole in common with the others or to receive his share of the rents and profits."

Carver v. Fennimore, 116 Ind. 236; 19 N. E. 103.

"Each tenant in common is equally entitled to the use, benefit, and possession of the common property."

Bohlen v. Arthurs, 115 U. S. 482.

"Every conveyance, devise, etc., of property to two or more persons in their own right creates a tenancy in common unless it plainly appears from the instrument creating the estate that a joint tenancy and not a tenancy in common was intended, and this although the words used would at common law have created a joint tenancy."

Am. & Eng. Ency. of Law, Vol. 17, p. 660, and authorities there collected.

It was with the foregoing well established principles in mind that the court in Shulthis v. McDougal (C. C. 1907), 162 Fed. 331, 170 Fed. 529, 95 C. C. A. 615, and Berryhill v. Shulthis, Id., said that the interest to which a member of the Creek tribe was entitled in the common land of his tribe was held by him "in effect by a tenancy in common."

In the case of a tribal community it is clear that the descent of Indian lands is cast according to the tribal laws even when the said lands are held in common. Thus, in *Jones v. Meehan*, 20 S. Ct. 1, 175 U. S. 1, 44 L. Ed. it was said:

"The right of inheritance in land of a member of an Indian tribe whose tribal organization is still recognized by the government is controlled by the laws, usages and customs of the tribe and not by the law of the State in which the land is situated, nor by any action of the Secretary of the Interior."

See also *Brown v. Steele*, 23 Kans. 672.

*O'Brien v. Bugbee*, 46 Kans. 1.

*Hannan v. Taylor*, 57 Kans. 1.

Specific provision for the determination of the course of descent of land to Indian heirs was made by the Act of February 28, 1891, c. 383, Sec. 5, 26 Stat., and innumerable statutes and decisions have recognized the rights of the heirs of Indians to participate in distributions of moneys and lands to which their communal ancestors were held to be entitled.

See *Old Settlers v. U. S.*, 145 U. S. 425.

*Stephens v. Cherokee Nation*, *supra*.

*Cherokee Intermarriage Cases*, 203 U. S. 76.

It is seen, therefore, that the conclusion of the court in *Shulthis v. McDougal*, *supra*, was in complete harmony not only with the tribal laws of the Indians but with the principles of the common law since ordinarily an estate in common may arise by descent and upon the death of an intestate commoner his property vests in his heirs as tenants in common.

See *Am. & Eng. Ency. of Law*, Vol. 17, p. 681, and authorities there collected.

It is also seen that while the Karok tribe has an estate upon condition in the tribal domain, the appellants as members of that tribe are in effect tenants in common with respect to the tribal property.

It remains to consider what rights are incident to the legal status of the appellants with respect to the bringing of this suit.

There are two kinds of possession, actual and constructive, or as they are sometimes called, possession in fact and possession in law.

Simmons Creek Coal Co. v. Doran, 142 U. S. 442.

Possession in fact is where the party is in actual use and enjoyment of the land.

Bacon v. Sheppard, 11 N. J. L. 197; 20 Am. Dec. 583.

It is hardly necessary to cite authority in support of the propositions of law that possession does not contemplate the actual reduction to use of the entire premises, and that the entry and possession of one tenant in common is presumed to be for the benefit of all, and will, in the absence of statute to the contrary, be regarded as the possession of all the co-tenants.

See McNeill v. San Francisco First Cong. Soc., 66 Cal. 105; Baker v. Whitney, 2 Fed. Cas. No. 787, 3 Sum. 475; Clymer v. Dawkins, 3 How. (U. S.) 674, 11 L. ed. 738.

Equally well established are the principles of law that one tenant in common may defend the common title for the benefit of all, and may sue separately and recover in ejectment the entire premises against all parties except his co-tenants for the benefit of all the co-tenants. These principles relating to tenants in common in general have been applied to the case of Indian commoners.



It is well known that the United States granted to the Choctaw Nation the base fee in a large tract of land which the Choctaws held in common in accordance with the tribal laws.

In *Kelly v. Johnson* (Ind. Ter. 1897), 39 S. W. 352, it was said:

“While the sale of land in the Choctaw Nation by a member of the tribe to a citizen of the United States does not pass title to the land, it does pass the grantee’s right of occupancy, and the grantor may defend such right as against third persons.”

Here, then, is an express ruling that an individual Indian commoner may defend his title in the communal property as against third parties just as may an ordinary tenant in common.

That a commoner may sue separately for a disturbance of his right of common is also clear.

*Kenyon v. Nichols*, 1 R. I. 106.

*Swillan v. Donnellan*, 115 U. S. 45.

*Pomeroy v. Mills*, 3 Vt. 410.

*Allen v. Woodward*, 22 N. H. 544.

*Proprietor of Common and Undivided Land and Meadows of Southold v. Horton*, 6 Hill, 501.

*Hart v. Burnett*, 15 Cal. 530.

*Vernon Irrig. Co. v. Los Angeles*, 196 Cal. 237.

*Santillan v. Moses*, 1 Cal. 92.

*Patterson v. Hitchcock*, 3 Colo. 533.

*Becker v. Pugh*, 9 Colo. 589.

*Darger v. Le Sieur*, 8 Utah 160.

Constructive possession or possession at law exists where one who is not in actual possession has the right at law to the possession.

See *Simmons Creek Coal Co. v. Doran*, 142 U. S. 442.

The same right to defend the title to the common property attaches to one who is in constructive possession that attaches in the case of possession in fact. It is immaterial, therefore, whether or not the Karok tribe as such is actually in possession of its domain through the possession of the appellants of certain portions of it; or whether the appellants are in actual possession of the entire domain, since both the Karok tribe and the appellants at least have constructive possession. It is submitted, therefore, that the appellants as members of the Karok tribe, whether they be tenants in common of the tribal domain, or whether they possess the interest of commoners therein, may bring this suit in their own names as members of the Karok tribe. And it has been shown that the defenses of laches and adverse possession may not be interposed by the appellants. (See p. 39.)

## XI

### THE SUIT IS NOT AGAINST THE UNITED STATES.

The bill is predicated upon the asserted right under the Treaty of Guadalupe Hidalgo and other laws of the United States of the Karok or Peh-tsick tribe of Indians to the undisturbed possession and exclusive occupancy of the tribal domain including land embraced within the Klamath National Forest, and prays for an injunction and temporary restraining order against executive officers of the United States to prevent the doing of acts with respect to the tribal domain, which will interfere with the tribal right therein. In sustaining the motions to dismiss the court held that the suit is a suit against the United States which has not been made a party thereto and which has not consented to be sued. It is submitted that in so holding the court erred.

It has been shown that the Karok tribe as such, and the appellants herein as bona fide members of that tribe, whether possessing the interest of tenants in common or commoners in the tribal property, have a vested right in the tribal domain, and that this right was not only acquired under the law of Mexico, and guaranteed to them by the Treaty of Guadalupe Hidalgo, but that it has been confirmed in them by a long line of decisions of the Supreme Court of the United States, beginning with the case of *Johnson v. McIntosh* in 1823 and extending down through the *Cramer* case, *supra*, decided in 1923. It has also been shown that there are but two ways in which the right or title of the appellants, once vested, could have been extinguished—that is by their voluntary consent and by the exercise by the United States of the right of eminent domain. It has not been pleaded that the title of the appellants has been extinguished in either of these ways.

It has also been shown that the Act of 1851 had no effect upon such title as the Karok tribe may have had, and that even if under the *Lone Wolf* decision Congress is to be deemed to have the plenary political power to extinguish that title without compensation by a legislative enactment, it has not exercised that power.

The facts are simply that the Karok tribe is in possession of and is actually occupying the tribal domain; that the appellants as bona fide members of the Karok tribe are in possession of and are actually occupying that domain; that out of a part of the tribal domain which has never been converted by any law into public domain, the President of the United States without authority of law and contrary to the specific terms of the Act of 1891, created the Klamath National Forest, and that pursuant to an unauthorized executive proclamation the appellees seek to exercise author-

ity and control over that portion of the tribal domain constituting the said Klamath National Forest.

The Karok title, according to *Spaulding v. Chandler* (1895), 160 U. S. 403, and in the transposed language of Chief Justice White, is "a title and right to the perpetual occupancy of the land with the privilege of using it in such mode as they may see fit until such right of occupation has been surrendered to the government."

This right of occupancy, according to *United States v. Cook*, *supra*, carries with it the right on the part of the owners of tenants for life, and what tenants for life may do upon the lands of a remainderman the Karok tribe may do upon the tribal domain the fee in which is vested in the United States.

It will not be contended here that the United States as the dominant owner, or remainderman, and in the exercise of its plenary power to deal with the Indians as it may see fit, may not send its political agents upon the tribal domain of the Karok tribe for the purposes of inspecting, supervising and controlling its political wards. To so argue would be absurd. In fact the United States owes a higher duty to these dependent people than to the citizens of the United States in general, and in the discharge of that duty may undoubtedly adopt the measures and pursue the course which the circumstances require. But it is contended that by reason of the political guardianship which it has assumed over the Indian tribes it also owes them a very high duty with respect to their property rights, and that supervisory methods which in fact amount to confiscation of property are not warranted in any view either of the law or political necessity.

The Bureau of Forestry of the Department of the Interior, later transferred to the Department of Agriculture,

and the Federal Power Commission were the outgrowth of that policy of public economy by which all enlightened governments are now actuated. Never was it assumed that the activities of these agencies of government, which were created to conserve the natural resources belonging to the public, were to be so administered as to impair private property rights. If in the conduct of such agencies of conservation it should become necessary for the public good for the Government to take private property it was, of course, assumed by Congress that such property would be taken in accordance with the law, that is by the exercise of the right of eminent domain with just compensation to the owners of the private property condemned for public use. In this way and this way only can the constitutional guaranty with respect to private property rights be respected.

Obviously, for the Federal Power Commission to authorize third parties, such as the Electro-Metals Company, to send its representatives and employees upon the Karok domain for the purpose of diverting streams and utilizing the land and its resources for commercial or industrial purposes, must have the effect of depriving the Karok tribe and the appellants of the exclusive property right of occupancy in the tribal domain which they have been held to possess. Surely it will not be argued that a remainderman may grant such privileges in land subject to the life tenure of another.

So, too, the administration of a part of that domain as a National forest by the Secretary of Agriculture through the agencies of the Department of Agriculture, must have a similar effect since the fundamental purpose of a forest reserve is to set apart and reserve the forests to the use of which upon their domain the Karok tribe are entitled by virtue of their right of occupancy as life tenants.

See *U. S. v. Cook, supra*.

It is apparent that if the free use by the Karok tribe of the natural resources of their domain, such as the forests and the water power of its streams, must by the development of federal agencies of conservation be curtailed, that this development can but have the effect of impairing for public purposes the private property rights of the Karok tribe and the appellants, which in the absence of compensation to the owners would be a violation of their constitutional rights.

The fact that the Indian tenants may not utilize the forests and streams of their domain in a way that will promote the public good is immaterial. Such a fact no more justifies the curtailment of their exclusive right of occupancy and the incidents of such occupancy, than would the similar use by any private owner of property justify the taking of the same for the public good. That which the public requires for its use must be paid for. The beneficial end for which private property is taken cannot be pleaded as justification for its confiscation by the Government.

Again, the granting of rights in the tribal domain, or any part thereof, to persons other than tribal members, by executive officers or agencies of the United States with the apparent sanction of the Government, pursuant to which the land is to be utilized in a way inconsistent with the exclusive occupancy, possession and enjoyment thereof by the Karok tribe and its members must necessarily have the effect of clouding the title of the Karok tribe and the appellants.

Nor is it to be argued with reason that the danger to the appellants is not imminent since it is to be presumed that the Federal Power Commission in its apparent view of the law may grant at any time the licenses for which application has been made, and the applications for which are pending before it.



Again, from time to time, the Secretary of Agriculture asserts control through his agents over the Klamath National Forest in the administration of the same as a government reservation, the assertion of which control must necessarily constitute a continuing series of acts in conflict with the exclusive right of occupancy of the Karok tribe, for if an exclusive right of occupancy implies any privilege in its owner it is the privilege of exclusive control, use and enjoyment of the property by the owner free of the interference of any one else.

Finally, it is submitted that even had the Acts of 1891 and 1920, authorizing the President to set apart forest reserves and creating the Federal Power Commission, respectively, in fact attempted to deal with the Karok domain in such a way as to deprive the tribe of its right of exclusive occupancy, those acts could have had no effect upon the Karok title since legislative acts impairing vested private property rights without just compensation are void.

See Am. & Eng. Ency. Law, 2nd Ed., p. 955, and authorities there collected.

Any act on the part of an officer or agent of the United States giving effect to an unconstitutional act of Congress is an *ultra vires* act, and certainly any acts of executive officers which have the effect of impairing vested rights, when not even committed under the authority of Congress, are *ultra vires* acts. In the instant case, therefore, the acts of the Secretary of Agriculture and his agents in the administration of a part of the Karok domain as a National forest when the land constituting the same was not authorized by Congress to be set apart as such, are clearly *ultra vires* acts. And the granting of the licenses, applications for which are pending before the Federal Power

Commission, equally clearly would be *ultra vires* acts on the part of the members of the Commission since they were not empowered by Congress to license the use of private property. It is such *ultra vires* acts that the appellants herein seek to enjoin.

Heads of departments in Washington, and other public officials, may be compelled by mandamus to perform purely ministerial acts, and prevented by injunction from the performance of acts which are *ultra vires*, or which they have no lawful authority to perform.

- Marbury v. Madison, 1 Cranch, 163; L. ed. 69.
- United States *ex rel.* Stokes v. Kendall, 5 Cranch; C. C. 163; Fed. Cas. No. 15, 517.
- Decatur v. Paulding, 14 Pet. 497.
- United States v. Schurz, 102 U. S. 378.
- Noble v. Union River Log Co., 147 U. S. 165.
- Hoover v. McChesney, 81 Fed. 472.
- Smith v. Reynolds, 9 App. D. C. 261.
- Kerivan v. Murphy, 28 C. C. A. 348; 49 U. S. App. 658.
- Dinsmore v. So. Exp. Co., 92 Fed. 714.

Where adequate compensation cannot be had at law, any person who will sustain injury by acts of an official may have an injunction to prevent injury; and such officer cannot plead the authority of an unconstitutional law in justification of his acts.

- Louisiana Bd. of Liquidation v. McComb, 92 U. S. 541.
- Osborne v. Bank of U. S., 9 Wheat. 859.
- Davis v. Gray, 16 Wall. 220.

Indians may sue in the courts.

- Strong v. Waterman, 11 Paige, 607; The Kansas Indians, 5 Wall. 737.

Seneca Nation of Indians v. Christy, 162 U. S. 288.

If the rights in the appellants alleged exist, executive officers of the government have no power at all to do the acts complained of since they are *ultra vires* acts, and they are as much subject to an injunction as they would be to mandamus if they refused to do acts which the law plainly required them to do.

See Noble v. Union River Logging Co., 147 U. S. 165, 172.

In the case cited, Mr. Justice Brown said:

“As observed by Mr. Justice Bradley in Board of Liquidation v. McComb, 92 U. S. 531, 541: ‘But it has been well settled that when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writs of mandamus and injunction are somewhat correlative to each other.’ ”

There can be no doubt in view of Lane v. Watts, 234 U. S. 525, 58 L. ed. 1440, that the United States is not a necessary party to a suit to enjoin an executive officer of the United States from doing an illegal act on lands to which title does not rest in the United States, and that executive officers may be enjoined from performing such illegal acts. In that case suit was brought to restrain the Secretary of the Interior from resurveying lands title

to which it was claimed had passed out of the United States. Justice McKenna, after holding that title to the lands had passed by location of the grant and approval of it, held that the suit was to restrain the Secretary of the Interior from an illegal act under the color of office which would cast a cloud upon the title of appellees and that this defeated the contention of appellants that the suit was against the United States or a trial "wherein an essential party is not present in the forum and is not even suable—the United States."

Similarly, the exemption of the United States from suit does not preclude suit to enjoin executive officers of the United States from performing acts which might interfere with rights of the Karok Indians to undisturbed possession and exclusive occupancy of lands within the Klamath National Forest of which they have not been lawfully divested.

Further, it was decided in the Noble case, *supra*, that when the title passes out of the United States, the jurisdiction of the courts attaches. It seems equally clear that the courts have jurisdiction over rights of occupancy and possession, title to which uncharged with the Indian right has never vested in the United States.

In the instant suit, plaintiffs are not asking the court to interfere with the official discretion of executive officers, but merely challenge their authority to do the things complained of. Such a suit is not against the United States but is directed against the abuse of power, and its merits must be determined accordingly.

See *Phila. Co. v. Stimson*, 223 U. S. 613, 619; 56 L. ed. 570, 577.

Being a suit to restrain unlawful acts, the bill does not fall under the decision in *Naganab v. Hitchcock*, 202 U.

S. 474, 50 L. ed. 1113, or *Oregon v. Hitchcock*, 202 U. S. 60, 50 L. ed. 935. In the former case jurisdiction of the courts was denied to entertain a suit to restrain the Secretary of the Interior from carrying out the provisions of the act of June 27, 1902 (32 Stat. 400), controlling the disposition of lands *ceded to the United States* by the Indians of Minnesota to be administered by the United States for their benefit, and in the latter case jurisdiction of the courts was denied to entertain the suit of the State of Oregon to restrain the Secretary of the Interior from allotting and patenting in severalty swamp lands within the Klamath Indian Reservation comprising lands ceded by the Klamath Indians to the United States by Treaty of October 14, 1864 (16 Stat. 107). Justice Brewer said in deciding the case:

“Again it must be noticed that the legal title to all these tracts is still in the government. \* \* \* So far as a grant of swamp lands is claimed, it must be held that the grant is in process of administration and until the legal title passes from the government, inquiry as to equitable rights comes within the cognizance of the Land Department. Courts may not anticipate its action, or take upon themselves the administration of the land grants of the United States.” 202 U. S. 702, 50 L. ed. 939.

In these two cases the lands involved had been ceded by Indians to the United States, and the absolute title of the United States to the lands as against the Indians was not disputed. The decisions rest upon the supposition that title to the lands belonged to the United States. There was no claim in either case that title to the right to undisturbed possession remained in the Indian tribes. In the instant case there has been no cession of lands by the Karok or Peh-tsick tribe and no yielding of the tribal

right to undisturbed possession and occupancy, nor has title to the lands uncharged with the Indian right been acquired by the United States by eminent domain or otherwise. Until the rights of the Indians are lawfully extinguished, executive officers of the United States have no authority to interfere with possession and occupancy by the Indians.

The one remedy against threatened interference is in the courts by injunction against officers unlawfully assuming to act under color of office.

Noble v. Union River Logging Co , *supra*.

Phila. Co. v. Stimson, *supra*.

Lane v. Watts, *supra*.

It is submitted that the Santa Rosa Pueblo case (1919), 249 U. S. 110, is conclusive of the point under consideration. The material facts in that case were that the Secretary of the Interior and the Commissioner of the General Land Office undertook to offer, list, etc., certain lands in Arizona title to which was claimed by the Indian community known as the Pueblo of Santa Rosa. The Pueblo as a community brought suit to enjoin the Secretary of the Interior and other officers of the United States from infringing their rights.

In the Santa Rosa case as in the instant case the head of an executive department of the Government and other officers of the United States were attempting to do under their interpretation of the existing law acts which would have the effect of clouding the title of the Indians and of depriving them of the exclusive occupancy of the land charged with their right. Notwithstanding the Act of Congress upon which the defendants in the Santa Rosa case relied for their authority, and which prescribed and



authorized the performance of the functions they sought to perform, it was held that the suit was not a suit against the United States.

MUNN, ANDERSON & MUNN,  
JENNINGS C. WISE,  
*Counsel for Plaintiffs.*



COURT OF APPEALS  
DISTRICT OF COLUMBIA  
FILED

FEB 26 1924

*Henry M. Hodges*  
CLERK.

No. 4110.

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**In the Court of Appeals of the District of  
Columbia.**

JANUARY TERM, 1924.

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STEVE SUPER AND BENJAMIN H. WILDER, APPEL-  
LANTS,

v.

HUBERT WORK, SECRETARY OF THE INTERIOR, AS A  
MEMBER OF THE FEDERAL POWER COMMISSION,  
AND HENRY C. WALLACE, SECRETARY OF AGRI-  
CULTURE, AS A MEMBER OF THE FEDERAL POWER  
COMMISSION.

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APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF  
COLUMBIA.

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**BRIEF FOR APPELLEES.**



# In the Court of Appeals of the District of Columbia.

JANUARY TERM, 1924.

---

STEVE SUPER AND BENJAMIN H. WILDER,  
Appellants,

v.

HUBERT WORK, SECRETARY OF THE IN-  
terior, as a member of the Federal  
Power Commission, and Henry C. Wal-  
lace, Secretary of Agriculture, as a  
member of the Federal Power Com-  
mission.

No. 4110.

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*APPEAL FROM THE SUPREME COURT OF THE DISTRICT  
OF COLUMBIA.*

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## BRIEF FOR APPELLEES.

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### STATEMENT.

The appellants, Steve Super and Benjamin H. Wilder, who identify themselves as members of the Karock or Peh-tsick tribe of Indians, as such and as citizens of the United States, instituted suit in the Supreme Court of the District of Columbia to restrain the several Secretaries constituting the Federal Power Commission from approving applications

presented to the Commission by the Electro-Metals Company for a permit for power projects affecting certain lands within the exterior boundaries of the Klamath National Forest in California, to which these Indians claim rights by virtue of asserted long-continued possession and occupancy.

As against the Secretary of Agriculture an injunction was prayed to restrain trespass upon these lands by his agents and employees in the administration of the forest and from other interference with this asserted right of possession. The Secretary of War, John W. Weeks, although named as a party defendant, was never served.

Separate motions to dismiss the bill of complaint were filed by the Secretary of the Interior (R. 11) and the Secretary of Agriculture (R. 12). These motions were sustained and a decree entered dismissing the bill. From that decree this appeal is taken.

In support of the action of the court below we submit the following propositions:

1. The suit is in substance one against the United States which has not been made a party thereto or given its consent to be sued.
2. The lands claimed by appellants are subject to the operation of the Federal Water Power Act.
3. To grant the relief prayed for would constitute an unwarranted interference by the court with the duties imposed and the powers conferred by Congress upon the Federal Power Commission and upon the Secretary of Agriculture.



4. The court is without jurisdiction of the subject matter of this suit in so far as it relates to the Secretary of Agriculture as such in the administration of the Klamath National Forest, since the suit to that extent is local in character.

#### **ARGUMENT.**

##### **I.**

The suit is in substance one against the United States which has not been made a party thereto or given its consent to be sued.

The plaintiffs ground their asserted rights upon:

(1) The provisions of the treaty of Guadalupe Hidalgo of 1848, under which the United States undertook to respect the property rights of Mexican citizens within the territory acquired from Mexico. It is claimed that under the Mexican and Spanish laws the Indians were entitled to the undisturbed possession and occupancy of the lands occupied by them. (Par. 5 of the bill.)

(2) The established policy of the United States in its dealings with Indians to respect and protect their right of occupancy of public lands. It is asserted that, regardless of the treaty aforesaid, the Karok tribe and its members acquired under the laws of the United States the right of perpetual and exclusive possession and occupancy of their tribal domain, subject only to the power of the Government to extinguish it by eminent domain.

It is important to note that no claim is made that the Karok or Peh-tsick tribe, or these particular

Indians, have *legal* title to the lands involved. The utmost claim is the right of undisturbed, exclusive, and perpetual occupancy. It is conceded that the legal title to the lands involved is in the United States.

Obviously, the purpose of the suit is to secure a judicial determination sustaining the asserted rights in these lands, for that would necessarily be the basis and a prerequisite to granting the specific relief prayed. It is clear therefore that the suit is one against the United States; it affects lands of which the United States is the holder of the legal title; it seeks to establish a claim therein as against the United States. This can not be done in the absence of the United States; its title can not be taken away, burdened, or impaired "behind its back." *Louisiana v. Garfield*, 211 U. S. 70; *Oregon v. Hitchcock*, 202 U. S. 60; *Naganab v. Hitchcock*, 202 U. S. 473; *New Mexico v. Lane*, 243 U. S. 52.

That the United States is not named as a party defendant is not controlling. The question whether it is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered. *Minnesota v. Hitchcock*, 185 U. S. 373, 387; *Louisiana v. McAdoo*, 234 U. S. 627, 629; *Ex parte State of New York*, 256 U. S. 490, 500.

These cases are not to be distinguished in principle from the case at bar on the theory that here it is not sought to divest the United States of legal title to the land. The purpose of the suit is to establish an ex-

clusive possessory right as against the United States. That would seriously impair and burden the Government title even though it did not divest legal title. If the United States is entitled to be heard on the question of whether its legal title should be divested, it is equally entitled to be heard upon the question whether that title should be burdened or impaired.

This case seems quite closely analogous to *Naganab v. Hitchcock*, 202 U. S. 473. There Naganab, a Chippewa Indian, sued for himself and for other members of the tribe to restrain the Secretary of the Interior from executing an act of Congress which authorized the creation of a forest reserve out of a portion of the lands ceded to the United States by the Chippewas, and also the sale of the timber thereon. It was asserted that the action of the Secretary was violative of the rights of the Indians under the cession whereby the United States undertook to dispose of the lands for the benefit of the tribe. It was held that the suit was against the United States and was ruled by the decision in *Oregon v. Hitchcock*.

So here these Indians are asserting that if the Federal Power Commission acts favorably upon the applications made by the Electro-Metals Company it will result in interference with their right of exclusive occupancy, and that the administration of the Klamath National Forest by the Secretary of Agriculture has like effect.

*Lane v. Watts*, 234 U. S. 525, and like cases are not applicable, for in those cases it was established that

the title to the lands involved was not in the United States.

## II.

**The lands claimed by appellants are subject to the operation of the Federal Water Power Act.**

The Federal Water Power Act, approved June 10, 1920, c. 285, 41 Stat. 1063, created the Federal Power Commission and prescribed its powers and duties.

Section 3 declares:

“Public lands” means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public-land laws. It shall not include “reservations,” as hereinafter defined.

“Reservations” means national monuments, national parks, national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public-land laws; also lands and interests in lands acquired and held for any public purpose.

By section 4 the Commission was empowered, among other things:

(d) To issue licenses \* \* \* for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation, and for the development, transmission, and utilization of power across, along, from, or in any of the navigable waters of the United

States, or upon any part of the public lands and reservations of the United States (including the Territories), \* \* \*: *Provided*, That licenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation: \* \* \*.

(e) To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 9 hereof: *Provided, however*, That upon the filing of any application for a preliminary permit by any person, association, or corporation the commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application; and shall also publish notice of such application for eight weeks in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated.

(g) To hold hearings and to order testimony to be taken by deposition at any designated place in connection with the application for any permit or license, or the regulation of rates, service, or securities, or the making of any investigation, as provided in this Act:

\* \* \*.



It is plain from the provisions just quoted that Congress did not intend to make impervious to the operation of the Federal Water Power Act lands occupied by Indians. On the contrary, it clearly manifested a purpose to subject lands so occupied to the provisions of the act, for section 4 (d) expressly authorizes licenses for power projects upon any part of "reservations of the United States," and reservations as defined in section 3 includes "tribal lands embraced within Indian reservations" and "*interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws.*"

As already pointed out, it is conceded that the United States has fee title to these lands and therefore the rights asserted by appellants would be within the purview of the language "interests in lands owned by the United States." But if that were not so, it can not be doubted that as the act was to affect lands within Indian reservations which had been expressly set aside for the Indians, much more does it apply to lands occupied by Indians not with the express but only the tacit consent of the Government. The act is therefore in effect an extinguishment of the Indian right of occupancy *pro tanto*. That there was power to extinguish this Indian title or right as provided in the act can not be disputed.

Congress possesses plenary power over the tribal property of the Indians. *Tiger v. Western Improvement Co.*, 221 U. S. 286, 310, 311; *Chase v. United States*, 256 U. S. 1. That power continues after the Indians have been made citizens. *Williams v.*

*Johnson*, 239 U. S. 414, 420; *Hallowell v. Commons*, 239 U. S. 506, 509; *Winton v. Amos*, 255 U. S. 373, 392.

The doctrine that the right of occupancy of their tribal lands is as sacred as the fee in the United States to the same lands (*United States v. Cook*, 19 Wall., 591; *Leavenworth & c., R. R. Co. v. United States*, 92 U. S. 733) does not extend to the United States in its dealings with such lands. *Lone Wolf v. Hitchcock*, 187 U. S. 553, 564, 565.

There can be no doubt of the power of the United States to extinguish that occupancy right or title, even though it be exercised contrary to treaty stipulations, and the propriety or justice of such action is a political and not a judicial question. *Beecher v. Wetherby*, 95 U. S. 517, 525; *Lone Wolf v. Hitchcock*, *supra*, at p. 566.

But provision was made for compensation to the Indians, for the act provides (section 10 [e], p. 1069):

That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the commission for the purpose of reimbursing the United States for the costs of the administration of this Act; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; \* \* \* :  
*Provided*, That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the commission shall fix a reasonable annual charge for the use thereof \* \* \* ;



and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than one hundred horsepower capacity may be issued without charge, except on tribal lands within Indian reservations;  
\* \* \*

And section 17 (p. 1072):

That all proceeds from any Indian reservation shall be placed to the credit of the Indians of such reservation. \* \* \*

Thus the Indians are to be compensated for any loss or damage to the lands resulting from any license issued by the Commission. So that the United States is not ruthlessly ignoring any moral obligation to the Indians. But were it otherwise, redress should be sought from Congress and not from the courts. Compare *Garland's Heirs v. Choctaw Nation*, 256 U. S. 439.

It is important to note that the Federal Water Power Act does not empower the Commission to grant rights in lands not subject to the control of Congress, nor does the Commission assume to do so. No power of condemnation is given to licensees. If the project affect privately owned lands the applicant must secure a right to use the property by proceeding according to State law by condemnation or otherwise. The regulations of the Federal Power Commission proceed upon this basis.

With respect to applications for preliminary permits (the kind here involved), Regulation 3, section 5, requires:

Statement of nature, extent, and ownership of water rights and of ownership of lands which applicant contemplates using in the development of each project. Also statements of applicant's plans with reference to perfecting water rights and to acquiring lands.

In applications for licenses, it is required that there be (Regulation 4, section 5):

Statement of the nature, extent, and ownership of the water rights and of ownership of lands which the applicant proposes to use in the development of the project or projects applied for, together with satisfactory evidence that the applicant has proceeded as far as practicable in perfecting its rights to use sufficient water for proper operation of the project works. A certified statement from the proper State agency setting forth the extent and validity of the applicant's water rights shall be filed if practicable. Whenever the approval or permission of one or more State agencies is required by State law as a condition precedent to the applicant's right to take or use water for the operation of the project works, duly certified evidence of such approval or permission or a showing of cause why such evidence can not be reasonably submitted shall be filed. *Statement of applicant's plans for acquiring lands owned by other parties and which are essential for carrying out the project.* If statement submitted with application for preliminary permit gives above information, a reference thereto will suffice (in triplicate). When State certificate is involved one certified copy and two uncertified copies will suffice.

It is therefore apparent that even if appellants had a fee title to these lands, one not subject to extinguishment by Congress, the action of the Commission in granting a license would not affect them. Interference by a license with such lands could be dealt with by appropriate action in a court having jurisdiction, but such action would lie against the licensee not the Commission.

### III.

To grant the relief prayed for would constitute an unwarranted interference by the court with the duties imposed and the powers conferred by Congress upon the Federal Power Commission and upon the Secretary of Agriculture.

The proviso to section 4 (*d*) of the Federal Water Power Act is as follows:

That licenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation: \* \* \*.

This confers upon the Commission authority to determine whether a permit or license shall be granted affecting lands within a reservation as defined by section 3. Congress having thus constituted a tribunal to determine such questions, its finding resulting from the exercise of judgment and discretion is not reviewable by the courts in a suit of this kind. *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316; *Ness v.*

*Fisher*, 223 U. S. 683; *Alaska Smokeless Coal Co. v. Lane*, 250 U. S. 549, 555; *Hall v. Payne*, 254 U. S. 343, 347, 348. Moreover, the Commission has not yet acted. The matter is now *in fieri*. It is well settled that the courts will not act while a matter is in course of administration in an executive department. *Minnesota v. Lane*, 247 U. S. 243.

It may be well to state at this point that the Electro-Metals Company has applied for *preliminary power permits* for two power projects. The purpose for which these are issued is stated in Regulation 9, section 2:

Permits will be issued only for the purpose of enabling applicants to maintain their priorities while securing the data required for an application for license and will be for such periods, not exceeding a total of three years, as in the judgment of the commission will be necessary for studying the proper location and design of the project; for making examinations, surveys, maps, plans, specifications, and estimates; for conducting stream measurements; for sinking test pits or making borings to determine foundations for dams or other structures; for securing a market for the power to be developed; for making financial arrangements; or for any other purpose necessary or desirable in the preparation of application for license.

These applications for permit have not yet been granted, but even if they were no right to construct the projects would result. The permits would merely preserve priority in the applicant while a study of the feasibility of the projects is made. Thereafter the permittee must make application for a *license*.

Thus it will be seen how premature this suit is. Not only have the permits not been granted but no license has been applied for. Surely such a state of facts presents no case for equitable interference by injunction. That writ does not issue where the asserted violation of complainant's rights is merely speculative. *Beach, Modern Eq. Jur.*, sec. 642; *State v. Thorson*, 68 N. W. (S. D.) 202. In this connection, we may call attention to the rule that in a suit for an injunction the interests of the defendant are to be considered as well as those of the complainant. *Wilson v. Shaw*, 204 U. S. 24, 31. To grant the injunction applied for would be "to clog the wheels of Government" (*Louisiana v. McAdoo*, 234 U. S. 632) in so far as it affects the execution of the duties imposed by Congress upon the Federal Power Commission in respect to the development and use of water power and those imposed upon the Secretary of Agriculture in carrying out the national policy regarding national forests.

So far as the Secretary of Agriculture is concerned, we say that Congress has committed the recognition and preservation of occupancy rights of Indians upon lands within national forests to him and to the Secretary of the Interior by section 31 of the Act of June 25, 1910, c. 431, 36 Stat. 855, 863, which reads:

That the Secretary of the Interior is hereby authorized, in his discretion, to make allotments within the national forests in conformity with the general allotment laws as amended by section                      of this Act, to any Indian



occupying, living on, or having improvements on land included within any such national forest who is not entitled to an allotment on any existing Indian reservation, or for whose tribe no reservation has been provided, or whose reservation was not sufficient to afford an allotment to each member thereof. All applications for allotments under the provisions of this section shall be submitted to the Secretary of Agriculture, who shall determine whether the lands applied for are more valuable for agricultural or grazing purposes than for the timber found thereon; and if it be found that the lands applied for are more valuable for agricultural or grazing purposes, then the Secretary of the Interior shall cause allotment to be made as herein provided.

The appellants are clearly within the terms of this legislation, for they are "not entitled to an allotment on any existing Indian reservation," and they are Indians "for whose tribe no reservation has been provided."

Now, as Congress has thus determined to what extent Indian right of occupancy of lands within national forests shall be recognized, and has provided how and where claims of that kind may be asserted, the courts may not properly interpose and adjudicate them, particularly in advance of action by the Secretary of the Interior in conjunction with the Secretary of Agriculture. Such action would constitute an invasion of the jurisdiction of the tribunal created by Congress. *Cosmos Co. v. Gray Eagle Oil Co.*, 190 U. S. 301, 308.

## IV.

The court is without jurisdiction of the subject matter of this suit in so far as it relates to the Secretary of Agriculture as such in the administration of the Klamath National Forest, since the suit to that extent is local in character.

The lands here involved are situated in the State of California.

The allegations of the bill are to the effect that various agents and representatives of the Department of Agriculture, acting under the authority of the Secretary, are occupying and asserting control over the lands within the Klamath National Forest to the exclusion of appellants' rights therein, and are denying appellants' rights of exclusive use and occupancy. (R. 6, Par. 20.) This in substance is an allegation of trespass. Such an action is local in character. *Ellenwood v. Marietta Chair Co.*, 158 U. S. 105; *Mason v. United States*, 260 U. S. 545, 558. Therefore it must be brought in a court whose territorial jurisdiction embraces the land in controversy. The Supreme Court of the District of Columbia can not entertain such a suit. *Dredging Co. v. Morton*, 28 App. D. C. 288; *Irrigation L. & I. Co. v. Hitchcock*, id. 587; *Northern Indiana R. R. Co. v. Michigan Central R. R. Co.*, 15 How. 233.

## CONCLUSION.

The judgment of the Supreme Court of the District of Columbia was right and should be affirmed.

H. L. UNDERWOOD,  
*Special Assistant to the Attorney General,*  
*Attorney for the Secretary of Agriculture.*

C. EDWARD WRIGHT,  
*Attorney for the Secretary of the Interior.*

FEBRUARY, 1924.





COURT OF APPEALS  
DISTRICT OF COLUMBIA  
FILED

No. 4110 OCT 27

*Henry H. Underwood*  
CLERK

**Court of Appeals of the District of  
Columbia**

OCTOBER TERM, 1924

**STEVE SUPER AND BENJAMIN H. WILDER, APPEL-  
LANTS**

**v.**

**HUBERT WORK, SECRETARY OF THE INTERIOR, AND  
HENRY C. WALLACE, SECRETARY OF AGRICULTURE,  
AS MEMBERS OF THE FEDERAL POWER COMMISSION**

**APPEAL FROM THE SUPREME COURT OF THE DISTRICT  
OF COLUMBIA**

**SUPPLEMENTAL BRIEF FOR APPELLEES**

**C. EDWARD WRIGHT,**  
*Attorney for the Secretary of the Interior.*

**H. L. UNDERWOOD,**  
*Attorney for the Secretary of Agriculture.*



# In the Court of Appeals of the District of Columbia

OCTOBER TERM, 1924

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STEVE SUPER AND BENJAMIN H. WILDER,  
appellants

v.

HUBERT WORK, SECRETARY OF THE IN-  
terior, and Henry C. Wallace, Secre-  
tary of Agriculture, as members of the  
Federal Power Commission

} No. 4110

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## SUPPLEMENTAL BRIEF FOR APPELLEES

The theory on which appellants sue is that the tribe of Indians to which they belong has a communal right of exclusive occupancy and possession of the land in controversy acquired under the laws of Spain and Mexico; that this right was a property right in them confirmed by the treaty of Guadalupe Hidalgo, and that it represents such an interest in the land that the right can be extinguished only by the voluntary consent of the Indians or by the exercise on the part of the United States of the right of eminent domain (par. 13 of the bill, R. p. 4).

It is the Government's theory that whatever right in respect to these lands the Indians may have, it

amounts to no more than the ordinary occupancy right indulged Indians in respect to the lands on which they may reside or which may be included in reservations set aside for that purpose, and that such an occupancy right may be interfered with or determined by the United States acting through Congress.

There are three sorts of "occupancy" which the court needs to consider in this case.

First, there is the individual personal occupancy of a particular Indian such as was involved in the case of *Cramer et al. v. United States*, 261 U. S. 219. In that case the court limited the relief to the boundaries of actual occupancy which could not be extended constructively to other lands even to make up a legal subdivision under the general land laws. This sort of occupancy is not described in the bill. Appellants are suing in respect to a vast area of land constituting what they call the tribal domain and as to which they assert a right to enjoy, in common with their fellow tribesmen, exclusive possession and occupancy perpetually (par. 25 of the bill, R. p. 7).

Second, the next sort of occupancy is described in *Barker v. Harvey*, 181 U. S., 481, at p. 491:

There is an essential difference between the power of the United States over lands to which it has had full title and of which it has given to an Indian tribe a temporary occupancy and that over lands which were subjected by the action of some prior Government to a right of permanent occupancy, for in the

latter case the right, which is one of private property, antecedes and is superior to the title of this Government and limits necessarily its power of disposal.

This is the sort of occupancy right which the appellants assert. It must be that, else their right is only the general occupancy right soon to be mentioned. The theory of their bill is that we acquired this land from Mexico burdened with a right of permanent occupancy in these Indians. Such a right would be one of private property. In that event the appellants' case must fail because these Indians did not submit their claim to the Private Land Claims Commission appointed under the act of March 3, 1851. *Barker v. Harvey, supra; Cramer v. United States, supra.*

In *Barker v. Harvey* the court ruled that, while the United States was bound to respect the rights of private property in the ceded territory, there could be no doubt of the power of the United States, consistently with such obligation, to provide reasonable means for determining the validity of all titles within the ceded territory, to require all claims to lands therein to be presented to the Commission for examination, and to declare that all not presented should be regarded as abandoned. The court said that the purpose of the act of 1851 was to give repose to titles and that it not only permitted but required all claims to be presented to the Commission and barred all from future assertion which were not



presented within the two years. The court then proceeded:

If these Indians had any claims founded on the action of the Mexican Government they abandoned them by not presenting them to the Commission for consideration, and they could not, therefore, in the language just quoted, "resist successfully any action of the Government in disposing of the property." If it be said that the Indians do not claim the fee, but only the right of occupation, and therefore they do not come within the provisions of section 8 as persons "claiming lands in California by virtue of any right or title derived from the Spanish or Mexican Government," it may be replied that a claim of a right to permanent occupancy of land is one of far-reaching effect and it could not well be said that lands which were burdened with a right of permanent occupancy were a part of the public domain and subject to full disposal of the United States. There is an essential difference between the power of the United States over lands to which it has had full title, and of which it has given to an Indian tribe a temporary occupancy, and that over lands which were subjected by the action of some prior Government to a right of permanent occupancy; or in the latter case the right, which is one of private property, antecedes and is superior to the title of this Government and limits necessarily its power of disposal. Surely a claimant would have little reason for presenting to the Land Commission his claim to

land and securing a confirmation of that claim, if the only result was to transfer the naked fee to him, burdened by an Indian right of permanent occupancy.

Again, it is said that the Indians were, prior to the cession, the wards of the Mexican Government, and by the cession became the wards of this Government; that, therefore, the United States are bound to protect their interests, and that all administration, if not all legislation, must be held to be interpreted by, if not subordinate to, this duty of protecting the interests of the wards. It is undoubtedly true that this Government has always recognized the fact that the Indians were its wards and entitled to be protected as such, and this court has uniformly construed all legislation in the light of this recognized obligation. But the obligation is one which rests upon the political department of the Government, and this court has never assumed, in the absence of congressional action, to determine what would have been appropriate legislation, or to decide the claims of the Indians as though such legislation had been had. Our attention has been called to no legislation by Congress having special reference to these particular Indians. By the act creating the Land Commission the Commissioners were required (section 16) "to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by pueblos

or rancheros Indians." It is to be assumed that the Commissioners performed that duty, and that Congress, in the discharge of its obligation to the Indians, did all that it deemed necessary and as no action has been shown in reference to these particular Indians or their claims to these lands, it is fairly to be deduced that Congress considered that they had no claims which called for special action.

In this case the bill shows that a treaty recognizing a right in these Indians as to a diminished portion of the lands failed of ratification in the Senate.

The case of *Barker v. Harvey* was recently under consideration by the Supreme Court in the case of *United States v. Title Insurance and Trust Co. et al.*, 265 U. S. 472. In that case there was a confirmed Mexican land grant in conflict with the lands claimed by the United States in behalf of certain Indians, and the suit was to quiet in these Indians a perpetual right to occupy, use, and enjoy the lands. The theory of the bill, as in the case at bar, was that under the laws of Mexico these Indians became entitled to the continuous and undisturbed occupancy and use of the lands, that they were in open, notorious, and adverse occupancy of such lands at the date of the private land grant, and that they have ever since remained in such occupancy save as disturbed by the defendants. These Indians, however, never presented their claim to the Private Land Claims Commission under the act of March 3, 1851, nor did the United States do so for them. The courts below held that the claim of the Indians, if

they had any, was abandoned and lost by the failure to present to the Commission, giving effect to the decision in *Barker v. Harvey, supra*. The Supreme Court declined to disturb the ruling in *Barker v. Harvey* and affirmed the decree entered by the trial court.

We submit that this decision applies to and controls the disposition of the case at bar.

Third, we are consequently reduced to the general occupancy right, common to all Indian tribes; and that right is subject to disposition by Congress. As the court said in the *Cramer* case, *supra*, the right is one that could be "interfered with or determined by the United States," taking this language from the decision in *Lone Wolf v. Hitchcock*, 187 U. S. 553. Cases on which the appellant relies involve the assertion of the occupancy right in Indians against third parties, States, or individuals. In none of them was there involved a controversy between the Indians and the United States.

The *Lone Wolf* decision is our authority for these propositions: That plenary authority over the tribal relations of Indians has been exercised by Congress from the beginning and the power is a political one not subject to be controlled by the judicial department of the Government; that power exists in Congress even to abrogate the provisions of an Indian treaty, although no treaty is involved in this case; that Congress has paramount power over the property of Indians by reason of its exercise of guard-

ianship and may interfere or determine the occupancy rights of Indians in lands; and if injury be occasioned, the relief must be sought by an appeal to Congress and not to the courts for redress.

In other words the bare occupancy right to which these Indians are reduced by the facts and by the law does not amount to a title so vested in them as to give them the capacity to maintain this suit.

C. EDWARD WRIGHT,  
*Attorney for the Secretary of the Interior.*

H. L. UNDERWOOD,  
*Attorney for the Secretary of Agriculture.*





